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REGULATORY REFORM LEGISLATION OF 1981

HEARINGS
BEFORE THE
COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
NINETY-SEVENTH CONGRESS
FIRST SESSION
ON
S. 344 and S. 1080

MAY 12 and JUNE 23, 1981

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REGULATORY REFORM LEGISLATION OF 1981

TUESDAY, MAY 12, 1981

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, D.C.

The committee met at 10 a.m., in room 3302, Dirksen Senate Office Building, Hon. William V. Roth, Jr. (chairman of the committee) presiding.

Present: Senators Roth, Cohen, Mattingly, Rudman, and Levin.

OPENING STATEMENT OF SENATOR ROTH

Chairman ROTH. The committee will please be in order.

I have an extensive statement dealing with the purpose of these hearings. Rather than read it at this time, I shall include it in the record, if there is no objection.

[Senator Roth's prepared statement follows:]

PREPARED STATEMENT OF SENATOR ROTH

The Committee on Governmental Affairs will today begin hearings on S. 1080, the Regulatory Reform Act of 1981 and related measures to control the growth of the regulatory burden on the economy and improve the regulatory process. Both the administration and the Congress have devoted a great deal of time and effort to improving the regulatory process and believe the regulatory reform issue is one of the highest priorities confronting the 97th Congress.

The Administrative Procedure Act, the statute governing the Federal regulatory process, has not been substantially amended since its enactment in 1946. Yet during that time, the regulatory activities of the Federal Government have grown enormously, expanding into whole new areas such as environmental protection and worker health and safety. Agency decisions often have not been adequately supported by scientific and economic research nor have agencies attempted to adopt the most cost-effective regulatory policies. S. 1080 seeks to change this practice by requiring agencies to give affected parties more opportunities to present written and oral communications (including the right to cross examination in select cases) and by requiring the agencies to determine that the benefits of each regulation justify its costs and that the regulation is cost-effective. This legislation will be a step forward in controlling the growth of regulation and in ensuring that agencies consider the costs of their regulations to the economy as well as the anticipated benefits.

I strongly believe, however, that we must also ensure that any legislation we enact does not add excessively to delay in the regulatory process or make it impossible to issue essential regulations. One of the problems we have in government today is no one can make clear, effective decisions. The regulatory process must indeed be improved so that costs are reduced but it also must be redesigned so that agency officials are accountable to the people for their decisions and so that effective decision-making can take place.

Federal regulatory activity has become a pervasive influence in American life. Today it's hard to think of a single aspect of economic or social activity untouched by government regulation. Regulatory agencies are "growth industries" gradually extending to influence both businesses and individual. We are witnessing the most rapid and consuming growth of centralized control over economic and social activities in our history, and this expansion is becoming extremely costly to both business and the general public.

The growth of Federal regulatory activities is just plain staggering. There are no universally accepted definitions of what regulation entails, but a few general figures illustrate its momentum and meaning. As late as the middle 1950's, the Federal Government had only four areas of major regulatory responsibility: antitrust, financial institutions, transportation and communications. By 1977, there were 85 Federal agencies regulating some aspect of private activity and over 116 different identifiable regulatory programs. Over one-fourth of these new agencies were created between the years 1969 and 1975. The thirty largest regulatory bodies employed more than 215,000 persons in 1977 and the growth in the total budget of all regulatory agencies was phenomenal—from $2.2 billion to fund Federal regulatory activities in 1974 to $4.8 billion to support such activities in 1979, a 115 percent jump.

The result of this rapid growth of Federal regulatory functions has been a tremendous increase in the regulatory burden on the American economy. While accurate calculation of costs is impossible, some experts estimate that the total regulatory burden on the economy may exceed $100 billion annually. It is essential that Congress act to provide regulatory relief.

In addition to addressing S. 1080, hearings in governmental affairs will also look at how the regulatory agencies are complying with Executive Order 12291, issued by President Reagan on February 17th. S. 1080 is similar in many ways to this executive order and we hope to learn from the experience of the administration in implementing this order. In addition, I have asked the General Accounting Office to prepare a report on what effect this bill will have on the agencies and on how much it will cost each agency to prepare a cost-benefit analysis. I hope to have the preliminary results of this study some time in June.

The committee is also interested in exploring the role of the President in the regulatory process, both with respect to executive branch agencies and independent regulatory agencies. Many of our problems with government regulation arise from inadequate coordination and a failure to set national priorities. Some attention must be given to the need for better Presidential coordination and authority.

Finally, this committee will also analyze several other regulatory reform proposals which may serve as useful complements to S. 1080. Proposals for legislative veto will be addressed, as will the concept of regulatory sunset and proposals to encourage negotiation in the regulatory process. Of special interest to members of this committee is the role of the courts in reviewing regulatory decisions, and we want to explore the potential impact of the so-called Bumpers amendment in depth.

I look forward to hearing from our witnesses today on this vital and pressing issue of national importance.

Chairman ROTH. In opening I would just like to point out that I think regulatory reform is one of the most critical problems this Nation faces if we are to succeed in developing an environment of growth. I am particularly concerned that the maze of programs, the proliferation of Government agencies, departments, and other instrumentalities plus the explosion of regulations issued by what some people have said are as many as 75 different regulatory agencies has made both decisionmaking and accountability, for all practical purposes, impossible in Government.

Somehow we have to work our way out of this maze so that decisionmaking can be prompt, so that the public will feel if they vote they know who to hold responsible and certainly one of the most important aspects of this problem is to deal with the problem of regulatory reform.

I will ask the other Senators at this time if they have any opening statement they would care to make.

Senator Mattingly?

Senator MATTINGLY. Not at this time.

Chairman ROTH. Senator Cohen?

Senator COHEN. I have an opening statement that I would ask unanimous consent to submit for the record.

Chairman ROTH. Without objection.

[Senator Cohen's prepared statement follows:]

OPENING STATEMENT OF SENATOR WILLIAM S. COHEN

I am pleased to be participating in these important hearings this morning to examine the issue of reforming the regulatory process. This is one of the principal themes of this Congress, and I would like to take this opportunity to commend the Administration for its commitment to reducing the burdens of government regulation.

It is increasingly clear that excessive and insensitive government regulation is holding back our economy, frustrating business enterprise, and working against the public interest by pushing the inflation rate even higher.

The role of government in regulating private business has expanded to the point where it is difficult to envision an industry that is unaffected by government regulations. In the 1950's, the federal government regulated activities in antitrust, financial institutions, communications, and transportation. By 1977, there were 85 federal agencies regulating private business, and the budget of these agencies had grown substantially.

Regulatory reform has been a major goal of the business community—especially small business—for a number of years. In testimony to this Committee during the last Congress, the National Association of Manufacturers cited a survey showing that only six per cent of businesses considered complying with regulations not to be a serious problem.

There is considerable debate as to what regulations cost businesses each year, but all agree that the costs are substantial. Murray Weidenbaum, who is one of our witnesses this morning, has estimated that cost to be $100 billion per year. The Council on Environmental Quality has predicted that costs of complying with environmental regulations alone will rise from $19 billion in 1977 to $52 billion by 1986. These costs represent resources that would have otherwise been used for productive purposes.

I am particularly concerned with the costs of regulations to small businesses. Small concerns are often forced to borrow heavily to make equipment modifications, finance inventory, and otherwise keep their operation running. Even if small businesses could afford additional debt, banks are often reluctant to loan money for goals which do not increase productivity. Large firms are able to afford to hire lawyers, accountants and the bureaucracy necessary to fill out forms and to keep records. Small firms must use their very limited resources for this task. While the passage of the Regulatory Flexibility Act last year was a victory for small business, I will be examining the bill sponsored by Senator Roth and Senator Laxalt, which is before us today, with the interests of small business in mind.

Despite the multiplicity of approaches to reforming the regulatory process, the goals are relatively simple: to require agencies to carefully evaluate the impact of proposed rules, and to periodically review existing rules to reassess the need for the regulations.

We certainly have a challenging task before us to design comprehensive legislation to balance the interests of laborers, consumers and business managers while preserving health, safety, and the environment. I look forward to working with the members of this committee toward that end, and I am pleased to be a cosponsor of the Chairman's regulatory reform legislation.

Chairman **ROTH**. I would also like to insert into the record at this time the statements of those Senators who were unable to attend today's hearing.

[The statements of Senators Percy, Durenberger, and Pryor follow:]

OPENING STATEMENT OF SENATOR PERCY

Mr. Chairman, I appreciate your moving quickly this morning in scheduling Committee hearings on S. 1080, the "Regulatory Reform Act of 1981." Clearly, strong effective regulatory reform legislation is long overdue, and I hope that the Governmental Affairs Committee will play a strong role in moving a responsive package of reform proposals through the Senate floor this year.

By now, the case for regulatory reform is well established. In the 94 years since this country entered the Regulatory Age with enactment of the Interstate Commerce Act of 1887, Federal intervention in our economic and personal lives has grown dramatically. In 1978, the General Accounting Office counted 120 Federal agencies with regulatory functions. Regulation is estimated to drain $100 billion from our national economy each year, impose 1.2 billion hours of paperwork on American citizens, and has become an intolerable drain on economic productivity.

As an example, President Reagan recently unveiled a program of regulatory relief for the troubled American automobile industry under which 34 Federal rules would be delayed or eased. The result—savings of $1.4 billion in industry capitol and $9.3 billion in consumer prices over five years—all without eroding gains we have made to improve the environment or safety of Americans.

The primary legislation before us today, S. 1080, the Regulatory Reform Act of 1981, incorporates several important improvements in how the Federal government regulates, and I congratulate Senators Paul Laxalt and Patrick Leahy for the fine work they have done in developing this proposal. The bill's underlying theme, the government regulations must be designed so that the benefits of a rule justify its costs, is sound and important.

I soon intend to introduce legislation requiring a "sunset" review of all major Federal regulatory agencies over a ten year period, a proposal which I believe will compliment the Laxalt/Leahy bill by adding a review of underlying Congressional mandates to the legislation's treatment of individual rules.

Because Federal regulation is so far-reaching, Congress must be especially prudent in designing legislation to correct the flaws that we all recognize do exist. We must make certain, for instance, that legislation adopted by Congress does not work at cross-purposes with efforts underway in the Reagan administration and its Task Force on Regulatory Relief—represented this morning by James Miller—to act directly against wasteful rules. Statutory prescriptions which tie the hands of government decision-makers and rely excessively on Judicial review can often be a two-edge sword, making government more bulky and less responsive.

As the Governmental Affairs Committee works to perfect S. 1080, I hope we will act to ensure that, while the goals of cost/benefit analysis and agency responsiveness are maintained, that we do not simply create new tools for lawyers representing special interests, or for those whose interest is delay.

In this regard, I am particularly concerned about the degree to which S. 1080 allows Judicial review of technical cost/benefit analyses, and expands the role of the courts overall through the so-called "Bumpers amendment." Also, the inclusion of a legislative veto of agency rules could have a seriously negative effect.

These concerns, I believe, are technical in nature, and can be solved with some hard work and close cooperation between the Administration and Congress, and between Governmental Affairs and the Committee on Judiciary.

The effort is certainly worthwhile this year when the American people have so clearly endorsed our goals and directions.

Thank you, Mr. Chairman.

OPENING STATEMENT OF SENATOR DURENBERGER

Mr. Chairman, I commend you for conducting the hearing on S. 1080, the Regulatory Reform Bill. I am proud to be a co-sponsor of that bill, along with you, Mr. Chairman, and 71 of our colleagues.

Without question, the most significant challenge to the Congress and the new Administration is to chart a different course for our government. We are in a new era characterized by needs and values in sharp contrast with those of the past. This era calls for innovative actions to handle extremely complex, interrelated problems. It calls for less reliance on the federal government, and more reliance on individuals, the private sector, and state and local governments.

The first order of business, is to put our economy on a sound footing. One of the necessary steps toward revitalizing the economy is to lift some of the restrictions that have hampered productivity, investment, creativity and growth. In other words, we must rethink, restructure, and reorient many federal government regulations.

Through regulation, the government now channels a tremendous proportion of this nation's resources. Some have referred to regulation as a hidden tax. I regard it more accurately as hidden national economic planning. Through regulation, the Federal government mandates how businesses, and state and local governments will spend their revenues, what products they will buy, what investments they will make, who they will hire, and what kind of a place the employees will work in.

No one would argue with the goals of most regulations: They are intended to protect us from health hazards, discrimination, accidents, and a host of other harmful results. The regulatory controversy focuses less on goals we strive for than on other concerns: The sheer number of regulations designed to protect us; the heavy-handed approach used to achieve health, safety and environmental goals; the costs of complying with regulations. There is no need to abandon legitimate health, safety and environmental objectives; there is a clear need to be more thoughtful in developing regulations and to look for alternative ways of achieving our national goals.

The Regulatory Reform Bill introduced today would begin that process of regulating with on eye toward consequences and costs, as well as benefits. The requirements of this bill would force regulators to weight costs and benefits; to entertain several approaches to meeting a goal, including techniques such as incentives which don't require regulations at all; to solicit ideas from the public; and finally, to select the msot cost-effective approach.

Furthermore, the bill would help us get rid of regulations that were ill-proposed in the first place, or which are no longer necessary. Each agency would be required to review all of its regulations, over a ten year period, and weed out those it can no longer justify.

These two provisions—for cost-benefit analysis and for review of existing regulations—are the linchpins of the regulatory reform bill. If only these two sections were enacted, we would have done the country a great service.

Significantly, this bill is not called the Omnibus Regulatory Reform bill. It does not address all the problems associated with regulation, and it was not designed to do so. However, there are two issues I believe the Congress must consider if it is to deal adequately with the regulatory problem.

First, I propose that the Congress and the Administration will not get a handle on government regulation and what it does to businesses, state and local governments, and individuals until we begin to look at regulations in a comprehensive fashion. We need to take a broader perspective, and to look at and understand the relationships among seemingly discrete regulations. We need to assume the perspective of the one who is regulated, and focus on the constrained environment he or she is forced to contend with just to carry on daily operations. We have been told, repeatedly, that regulations conflict, and that some of them impose requirements which cannot be met. Yet, we continue to consider regulations on an individual basis, as separate and unrelated.

We need a framework for viewing the entire body of regulations and examining their relationships. We need to impose some discipline on the creation of new regulations, and particularly on the costs of complying with them. Armed with such information and with some self-imposed constraints on costs, we will be in a better position to consider trade-offs among regulatory goals, to make independent judgments about the hardships of complying, and to phase compliance over a realistic time period. Importantly, we will be in a better position to judge what proportion of our national resources are committed to achieving regulatory goals, and whether that level is appropriate or not.

In short, we need something like a budget on regulations. The Congress and the Administration must impose some constraints on regulations and their costs, and begin asking the significant regulatory questions.

Secondly, I would propose that regulations can be improved if all those who will be affected by them are encouraged to have a part in developing them. All parties should be given equal opportunity to be a part of the rulemaking process. Their expertise should be sought by the regulators. None should be disadvantaged because of lack of financial resources. I do not believe the bill before us addresses the issue of participation in the rulemaking process adequately. I suggest that there would be great benefit from broader consultation will all interests involved, and I further suggest that the Congress should ensure equal access for all parties who have a legitimate stake in a particular rulemaking.

Mr. Chairman, I commend you and Senator Laxalt for taking the initiative in developing this important piece of legislation. It will enhance the great work already underway in the executive branch to rid the country of costly, unnecessary regulations. Under the able leaderhship of Vice President Bush, major regulations are now being scrutinized and many have already been judged superfluous. We can insure that this initiative to change the role of Government will become institutionalized by moving ahead with the regulatory reform bill.

Opening Statement of Senator Pryor

I am pleased the Committee on Governmental Affairs is initiating these hearings on Regulatory Reform legislation. This committee has been in the forefront of Congressional activity to reduce the burdens of federal regulation on individuals and businesses and I am pleased to see that its work will continue under the chairmanship of Senator Roth.

I am also pleased to be a cosponsor of S. 1080 which I hope will form the basis for statutory reform in this area. While I believe that enactment of a legislative veto provision is essential to full reform of government regulation, I support the initiative of Senators Laxalt, Leahy and others in developing S. 1080.

Government regulation can be expensive. The Business Roundtable testimony two years ago suggested that incremental costs of regulation amounted to over 10 percent of capital expenditures of the companies surveyed. Other studies, including those by one of the witnesses today, Chairman Murray Wiedenbaum of the Council of Economic Advisers, have suggested that the overall costs of regulation are substantial.

Government regulation can be time-consuming. Delay in the process, whatever the cause of the delay, is burdensome and expensive to everyone directly or indirectly affected.

Government regulation, where that regulation is ill-advised or poorly implemented, hurts not only business and individuals but it also hurts government. The American people are willing to accept reasonable restrictions that enhance health, safety or other important purposes. They will not, however, suffer quietly when unreasonable burdens are placed on them and they should not be asked to suffer.

Finally, I want to say again what I said two years ago when this committee began its regulatory reform hearings in the last Congress. I said that a lot of people were pointing fingers at the causes of regulatory problems and I wanted to point the finger at myself and my colleagues in the Congress. I still believe what I said then is true. We in the Congress have the duty of oversight and the power of the purse. We are elected to decide what government should do, not to delegate those decisions to agencies or consultants to agencies.

I believe statutory reform is needed and I support it. I also believe, however, that new laws are no substitute for Congressional courage to make the hard choices and do the painstaking work necessary to make hard choices. I hope these hearings will be enlightening and also soul-searching for all of us.

Chairman ROTH. At this time we are particularly pleased to have with us Mr. James Miller, who is the Administrator for Information and Regulatory Affairs, Office of Management and Budget.

He is accompanied by our good friend, Murray Weidenbaum, Council of Economic Advisers; as well as Mr. Gray.

Mr. Miller, you may either read your statement or if you want to summarize it, include it as if read, we will leave that choice with you.

TESTIMONY OF JAMES C. MILLER III, ADMINISTRATOR FOR INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET, ACCOMPANIED BY MURRAY L. WEIDENBAUM, CHAIRMAN, COUNCIL OF ECONOMIC ADVISERS, AND C. BOYDEN GRAY, COUNSELOR TO THE VICE PRESIDENT

Mr. MILLER. Mr. Chairman, we welcome this opportunity to appear before you today. Professor Weidenbaum and I have and Mr. Gray have colluded on our appearance before you if that is permissible and I think it is appropriate for Professor Weidenbaum's statement to be presented first.

Mr. WEIDENBAUM. If I may, Mr. Chairman, I will briefly summarize; the longer statement which I would like to submit for the record.

It is a pleasure to be here once again. The hearings before this committee in the past have been invaluable in creating a positive atmosphere for moving ahead on regulatory reform. The administration welcomes the opportunity of testifying today.

I think it would be useful to point out the areas of broad agreement with the Congress. One, the regulatory apparatus must be brought under better control so that responsible Federal regulation—where it is clearly necessary—is once more the servant of the public interest, not its master.

Two, we need to put the burdens of overregulation into perspective so that in the future the benefits derived from regulation will be at least commensurate with the costs imposed.

Three, regulatory reform is a key component of the President's economic recovery program and must be successfully implemented as part of the fight against inflation and economic stagnation.

I cannot stress too emphatically the fact that this administration—from the President on down--is dedicated to achieving meaningful and lasting regulatory reform, and that this effort is viewed as an equal partner with budgetary and monetary restraint in restoring our economic health.

Since January 20, 1981, an unprecedented program of regulatory relief has been launched by the Reagan administration. After nearly 4 months, it seems appropriate to take stock of the changes that have been made.

I would like to briefly cover what I call our regulatory scoreboard, the 34 specific regulatory actions and 1 legislative change that will save the motorist $9.3 billion and the automobile industry capital outlays of $1.3 billion.

We have withdrawn, postponed, or rescinded seven major regulatory proposals of the previous administration. Two of those rules alone would have imposed costs in excess of $100 million a year.

We have postponed an additional 36 rules that were caught up in out initial freeze of some 172 "midnight" regulations developed by the previous administration.

We have ordered 13 departments and agencies to conduct intensive reviews of 27 major existing rules, ranging from testing procedures for new drugs to waste water treatment standards.

We have revoked two Presidential directives, one of which imposed onerous burdens on American exporters and another mandating an extraordinarily inefficient approach to building temperature control.

We have abolished, by Executive order, the prior administration's Council on Wage and Price Stability, eliminating the paperwork and regulatory burdens resulting from that agency.

We have issued an Executive order decontrolling crude oil prices and abolishing the cumbersome and inefficient entitlements programs.

We have taken three major procedural actions: Our initial 60-day regulatory freeze, the establishment of the Vice President's Regulatory Task Force, and an Executive order that specifies the use of cost-effective alternatives for achieving regulatory objectives.

All in all, by my estimate we have taken 106 significant regulatory actions, revoked or issued 5 Presidential directives involving regulatory relief, and established an ongoing high-level administration task force.

That surely is an unprecedented set of actions in a 4-month period. More fundamentally, it provides a striking change from previous administrations which were characterized by rapid growth of regulatory activities. A copy of our April 23 Progress Report on Regulatory Relief is attached to my prepared statement.

Our philosophy is to halt decisively the intrusion of the Federal Government into the lives of our citizens, into the decisions of our businessmen, and into the choices faced by tens of thousands of State and local government officials and administrators.

As a general rule, we simply do not believe that workers, managers, investors, and administrators need the Federal Government to make reasoned and intelligent decisions about how best to organize and run their own lives and their daily activities.

By our actions we are removing Federal mandates forcing business firms, educational institutions, and State and local governments to spend billions of dollars of scarce revenues to provide services and products for which there is little or no genuine demand.

By removing these mandates, we are providing the average citizen with greater freedom to choose, a lower rate of inflation and the potential for larger after-tax incomes. Let no one say that regulatory reform is playing second fiddle in the President's economic recovery program.

Regulatory reform is good economics: Less costly and more sensible regulation will help turn the American economy around. Our initial efforts are only the beginning. There is so much that needs to be done after long years of neglect, that our efforts so far are just scratching the surface.

Since this is a new process, the tools and institutional mechanisms for carrying out regulatory reform are still being developed. So we need to improve and build upon what we have available to do the job as we go along.

I have drawn three lessons from our work so far that relate to the legislative initiatives before this committee which I would like to share with you. All of these lessons are derived from the same basic point: regulatory reform is a learning process and thus there is great need for flexibility in order to incorporate new insights and develop more sophisticated tools.

Lesson No. 1 is that we need administrative flexibility. Otherwise, a promising set of requirements could degenerate into meaningless paperwork using resources which could be put to more productive uses.

For example, OMB's waiver power in the Executive order—allowing it to exempt certain agencies and regulations from parts of the Executive order—is every bit as important as its power to review regulatory impact analyses.

Otherwise, OMB could be overwhelmed by trivia to the detriment of exercising effective oversight. If the President is to be able to control the process of regulation, then he and his appointees must have the ability to tailor reviews to the appropriate level on a case-by-case basis.

The second lesson is that we are in the midst of an evolutionary process. It would be most unfortunate if legislation were to freeze this process of growth prior to its ultimate development. We must be alert to insist upon the use of new and more productive techniques in reviewing regulation and to remove procedures which are no longer appropriate.

The third lesson is to be wary of unintended consequences. Well-intended legislation adopted in reaction to the shortcomings of previous administrations could actually hinder the President's efforts at deregulation. We are concerned that inflexible legislative requirements could block new regulatory initiatives by agencies which could result in less regulation.

Turning to the details of the legislation now before the committee, S. 1080 impresses me as a constructive proposal on these regulatory reform matters about which we all feel so deeply. I hope that S. 1080 in its present form, as well as my remarks and those of my colleagues can be seen as part of the needed dialog about the best ways to effect significant reform. With that in mind, I would like to make a few quick points.

I am concerned about a possible permanent "locking in" of regulatory analysis procedures. For example, there is no provision here for an OMB waiver power, which I believe necessary, for the reasons explained earlier.

Nor has cost-benefit analysis yet been developed to the extent necessary to make it the exlusive basis for evaluating regulatory proposals, although obviously it is a very important tool.

I am troubled about the potential for uncertainty and extended court intervention inherent in the revision of the Administrative Procedure Act, both with regard to presumptions of agency expertise and the prospective review by courts of agency compliance with legislative requirements. Section 3(f)(3) of the bill might be clarified to address those concerns directly.

On the positive side—and I would like to emphasize that—the sunset review provisions are most promising, and the venue provisions are an excellent way of dealing with the "race to the courthouse" problem.

In summary, I believe that S. 1080 is an important step forward in developing improved regulatory procedures.

Regarding S. 344, unfortunately I can't be as enthusiastic. This bill embodies a form of legislative veto about which the administration has reached a strong, adverse conclusion.

It is our belief that this provision is an unconstitutional intrusion on the President's authority to manage the executive branch of Government and to see that the laws are faithfully executed.

Although the administration is not opposed to all congressional veto provisions, and—without giving up its duty to question the constitutionality of the matter in court—could accept certain versions applying to selected independent agencies, it would be compelled to oppose vigorously any congressional veto provision of the kind in S. 344 that applied to executive branch agencies.

Regarding another bill which has been introduced, H.R. 746, I will not go into detail here. I would just like to say that I am in accord with the testimony that James Miller of the Office of Management and Budget delivered last week.

I hope that these points are helpful and taken in the spirit of cooperation in the regulatory reform effort.

Chairman **Roth**. Thank you, Mr. Weidenbaum. I think rather than starting with the questions we will receive all the testimony. Then the committee will be free to ask questions of any one of you. Mr. Miller?

Mr. **Miller**. Thank you, Mr. Chairman. Let me just reiterate what a pleasure it is to be here. We are honored to appear before your committee. I am honored to be here with my colleagues, Professor Weidenbaum, Chairman of the Council of Economic Advisers, the person who has been the pace setter in this regulatory reform, regulatory relief movement and C. Boyden Gray, counsel to the Vice President and also counsel to the task force.

In recent years this committee has made substantial progress in identifying major problems of regulatory procedure and ways of dealing with them. We have had a cordial working relationship with you and your staff and look forward to a continuation of this relationship in the future.

Before addressing the merits of the major bills before the committee, I would like to emphasize the importance of the President's program of regulatory relief and discuss our early experience under Executive Order 12291, Federal Regulation.

President Reagan has made regulatory relief one of the four cornerstones of his program of economic recovery. The first is budgetary restraint, the second is tax reduction, the third is regulatory relief, and the fourth is a stable monetary policy. All of these share the fundamental philosophical underpinning of increasing aggregate economic activity so as to increase employment opportunities, reduce inflation, and raise the real incomes of all Americans.

Budgetary reductions are a means of putting more resources in the private sector, where they are more productive. Reductions in tax rates reduce the disincentives for consumers to save and for businesses to invest. Regulatory relief, of the type that leads to achieving regulatory goals at lower costs, increases the supply of goods and services available for satisfying other pressing needs. And a stable monetary policy reduces uncertainty and therefore leads to greater investment on the part of businesses and more thoughtful and rational expenditures on the part of consumers.

As I have already stated, the President has given regulatory relief an extraordinarily high priority since coming into office. The day after the inauguration he asked the Vice President to chair a Cabinet-level task force on regulatory relief, which has been charged with reviewing new regulations, assessing existing regulations, and coordinating the administration's legislative policies in the regulatory area. As the Vice President has indicated, the charge given his task force is not to study regulation or study ways of reforming regulation, but to provide regulatory relief.

I think we have made significant progress under the President's program. Aided by Executive Order 12291, which I will describe in more detail in a moment, we have moved forward to address many of the more pressing problems. Almost every agency has been involved. Most notably, the Department of Energy has moved expeditiously in removing restraints on energy production and distribution. The Department of Labor—including the Occupational Safety and Health Administration—has responded to the acute need of finding ways to achieve health and safety goals at lower costs. The Environmental Protection Agency has taken important initiatives to streamline its regulatory procedures and grant relief amounting to considerable savings at little or no harm to the environment. The Department of Transportation likewise has identified numerous regulations—especially those affecting the automobile—which demand prompt attention.

Although we do not yet have final figures, I can assure you that the relief measures identified thus far amount to billions of dollars per year. Moreover, what has taken place to date is only the tip of the iceberg. Much more will be forthcoming. Vice President Bush, Director Stockman, Chairman Weidenbaum, and other members of the task force have made it plain to us that their expectations for regulatory relief are very high. The President wants it, and the country demands it.

Now, let me turn to the administration's experience under the new Executive order. First, I think it is important to bear in mind that Executive Order 12291 has been in place only since February 17, and, therefore, experience has been too short and insufficient to permit a definitive judgment as to precisely how it will work in the long run.

The Executive order has three major parts. First, it sets forth the President's regulatory principles. These include requirements that if the agency wishes to regulate, it should do so for good reason; the benefits of the regulation should exceed the costs; the agency should choose the least costly way of securing the regulatory objective; and the regulation should maximize net benefits.

Second, the Executive order establishes the preeminence of the Presidential Task Force on Regulatory Relief in matters concerning regulatory policy.

Third, the Executive order creates a mechanism through which the Office of Management and Budget—OMB—under the overall direction of the Task Force, is to review proposed regulations and consult with agencies about them. It also calls for a mechanism for OMB to identify existing regulations which agencies must address, and for OMB and the Task Force to coordinate the development of legislative proposals in the regulatory area. Consistent with the responsibilities of my office under the Paperwork Reduction Act of 1980, we have endeavored to combine the processing of regulatory proposals as to their paperwork requirements and the substance of the regulations. Accordingly, we have developed a computerized system to monitor all regulations that are forwarded by executive branch agencies.

Numerous regulatory agencies—independent as well as those in the executive branch—have submitted rules for review under the order as shown below.

Department/agency:	*Submissions*
Agriculture	101
Commerce	38
Community Services Administration	1
Education	34
Energy	17
Environmental Protection Agency	161
Federal Emergency Management Agency	5
Federal Inspector for Alaska Natural Gas Transportation	4
General Services Administration	13
Health and Human Services	15
Housing and Urban Development	37
Interior	22
Justice	15
Labor	31
National Foundation on the Humanities	5

Department/agency:	*Submissions*
Nuclear Regulatory Commission	1
Office of Personnel Management	10
Small Business Administration	2
State	2
Transportation	110
Treasury	1
U.S. Metric Board	3
Veterans' Administration	30
Total	658

Mr. MILLER. I would note that the Departments of Agriculture and Transportation and the Environmental Protection Agency have all submitted more than 100 rules for us to review.

One tangible result of our efforts has been to reduce significantly the flow of new regulations from the executive branch agencies. As shown in the table below, the rate of issuance of new regulations—both final and proposed—is down by more than a third since January, and the number of pages printed in the Federal Register has been cut by more than half.

FEDERAL REGISTER—AVERAGE DAILY NUMBER (1981)

	January	February	March	April	Percent change April vs. January
Final rules	38	21	21	23	−39
Proposed rules	25	14	11	16	−36
Pages printed	461	230	231	214	−54

Mr. MILLER. I want to stress, however, two points with regard to our experience under the Executive order. First, although I have been a close student of this matter since having a responsibility for President Ford's inflation impact statement program, I continue to be amazed at the variety of issues that crop up from time to time. Thus, it is my firm belief that institutional arrangements for addressing such issues must remain flexible. No one can know in advance all the contingencies and be able to establish hard and fast rules for dealing with them.

Second, I am daily thankful for the authority contained in the Executive order to exempt regulations. For example, we discovered quickly that a morass of detailed minor regulations would quickly clog our regulatory review pipeline. The authority granted by the Executive order allowed us to exempt certain classes of Internal Revenue Service, Environmental Protection Agency, and Department of Transportation regulations that threatened to bring our program to a standstill. On the other hand, our ability under the Executive order to identify certain regulations as "major" keeps the agencies on their toes and enables us to take a close look at particularly controversial or burdensome regulations that normally would not qualify as "major."

Mr. Chairman and members of the committee, we in the administration heartily support the basic outlines of S. 1080, the proposed Regulatory Reform Act, and look forward to expeditious treatment of the bill by Congress. We wish to emphasize, however, that the business of procedural reform is a two-edged sword. Like so many things in life, a good idea pushed to extremes can be counterproductive, just as bad ideas always are. We want to work with you to insure that in any resultant legislation the appropriate balance is struck between strengthened procedures and the necessary flexibility to implement them. I believe that by and large S. 1080 strikes the appropriate balance.

We do have certain concerns with the language of S. 1080, concerns we believe should be addressed in the legislative process.

Two generic points especially concern us. First, we want to make very certain that the bill would not restrain the administration's ability to achieve regulatory relief under the Executive order. We believe that a clear enunciation of the President's regulatory principles and the oversight role of OMB and the Task Force are crucial to the success of this effort.

Second, we note that a significant difference between the review process under Executive Order 12291 and the process that would be established by S. 1080 is the role of the judiciary in achieving the purposes of the program. Under the Executive order, there is no judicial enforcement of the additional requirements imposed upon the agencies. In other words, there can be no judicial challenges to agency rules on the grounds that a rule should or should not have been a major rule that the regulatory impact analyses and reviews were inadequate, or that any other requirements of the Executive order had not been satisfied. The Executive order relies upon the Executive to enforce compliance with the order, and I can assure you that we will continue to do this aggressively. It may be appropriate at some point to involve the courts in ensuring compliance with new regulatory procedures, but we must insure that we do not create a new gauntlet of judicially reviewable procedures which could be used for purposes other than those for which regulatory reform is intended.

With just a few changes, we believe the bill before you would satisfy these concerns. Essentially, what is required is an executive branch oversight mechanism that permits the White House greater enforcement over major rule designations and compliance with the bill and that concomitantly reduces the courts' role in these areas. We also believe that it would be simpler to put the new procedural provisions in a new chapter 6 of the Administrative Procedure Act, rather than run the risk of unintentionally complicating the well-understood provisions of existing chapter 5.

With these and other minor changes, we believe that the basic provisions of the bill would result in worthwhile, long-lasting reform of the regulatory process. As our Executive order indicates, we believe that it is essential to do benefit-cost analysis where appropriate and to insist on the most cost-effective means of achieving a statutory goal. Moreover, we believe it equally important to provide a mechanism for the review of existing rules. While we can achieve these same ends under the Executive order, it would be useful to perpetuate these principles—many of which, we should add, were identified by this and other committees during the last 2 years.

Similarly, it is important to require agencies to reveal at the outset of a proceeding precisely what data and studies they are relying upon, so that all interested parties may be able to participate more fully. Fuller participation is also insured by other provisions which prohibit final agency reliance on material not available for comment. These are important provisions and we support them.

The bill also contains a hearing modification for major rules that has come to be called hybrid rulemaking. We agree with the bill's sponsors that hybrid procedures would improve the regulatory process by strengthening the factual basis for rules, so long as the provision for judicial review is carefully circumscribed to avoid dilatory litigation over purely procedural issues. With minor technical changes, we believe S. 1080 could accomplish that objective.

In connection with judicial review, we should add one point about the Bumpers amendment. We see no serious problem in eliminating any presumption of validity with respect to an agency's assertion of power or jurisdiction beyond its statutory authorization. Indeed, under the Executive order we shall endeavor to accomplish this same objective. But other presumptions not involving agency jurisdiction or power—such as those relating to procedural regularity, statutory interpretation of technical or scientific provisions, and an agency's own rules—serve a useful purpose in focusing judicial review on the issues of significance. Moreover, elimination of those presumptions would undo nearly half a century of precedent and create needless uncertainties and litigation.

Now let me comment briefly on S. 344. This bill contains a mechanism which would allow individual committees of Congress to delay the effective dates of a significant regulation for 60 days or more. While the administration supports increased congressional oversight of regulatory agencies, it has serious constitutional concerns with respect to legislative veto devices and opposes any legislative veto that applies to executive branch agencies. It is not my role to discuss the constitutional or legal objections to such devices. I can say, however, that as a matter of policy the administration could accept certain versions of a legislative veto mechanism applying only to selected independent agencies.

Finally, we would like to note that neither procedural legislation nor legislative veto is a substitute for reform of substantive statutes like the Clean Air Act. Passage of S. 1080 would improve the regulatory process. But the organic statutes must be reexamined and we would welcome consideration of legislation that would provide for the periodic and comprehensive review of existing legislated regulatory programs.

Mr. Chairman, members of the committee, that completes my prepared statement. Dr. Weidenbaum, Mr. Gray, and I shall be happy to address any questions you might have.

Chairman ROTH. Thank you, Mr. Miller.

In the interest of insuring everyone has an opportunity to participate we will limit on the first round questions to 10 minutes. Just one comment on the legislative veto, Mr. Miller. To me it is interesting that every occupant of the White House always comes out opposed to legislative veto on one ground or another. You did not discuss the constitutional aspects of the problem. I would note, however, that all administrations have been willing to accept reorganization of the executive government subject to a veto so that I think there is considerable precedent for that approach. I can see from all of these standpoints there may be some reservations.

Mr. MILLER. Could I just amplify, Mr. Chairman? I think from the standpoint of policy this administration has no reservations about a legislative veto applying to the select independent agencies. The President has indicated clearly his concern over the control or lack of control of independent agencies. If you are in Congress or a member of the congressional staff and you talk to someone at the independent agency very often you are told we are an independent agency and you are engaged in ex parte communication and the administration sets our agenda, so forth. But on the other hand if you are in the administration and you get the same kind of resistance and moreover you are told, we are now an arm of Congress. The upshot of that is that these independent agencies are too independent. They are not really given sufficient oversight. The President is very concerned about that. He has indicated a desire to consider legislative veto types of mechanisms as a policy matter over the independent agencies. He is not in favor of legislative veto over executive branch agencies, agencies under his direct supervision and control.

That is notwithstanding the question of the constitutional issues or the legal issues. He feels that, of course the executive branch has the responsibility to address these issues and that they should be tested out in the courts. Of course he would follow the decision of the courts with respect to that matter.

Chairman ROTH. First, I would like to say that I, for one, appreciate the aggressive approach that the administration is taking to this regulatory maze and congratulate you for what you have done. I would have to underscore that I think only that the tip of the iceberg has been touched.

One of my concerns in developing this kind of legislation is that we don't do something that appears good in theory but in practice might prove less practical. One of the questions I would like to ask you gentlemen goes to the so-called concept of cost effectiveness. Very frankly, after several years in the Congress I have a pretty jaundiced view of this kind of approach because I fear that you can prove almost anything you want. As a member of the Finance Committee listening to the various economists, maybe I should address this to you, but you can always find an economist or others that will support your position. This bothers me because the one thing I think we don't need in Government is to create requirements, papermaking requirements that delay a process or decisionmaking of the Government but result in no practical impact on what you are trying to correct.

What assurance do we have that if we adopt these kinds of procedures that cost effectiveness will be an effective means of insuring that new regulations are effective or don't we face the real possibility that this administration or any new administration can probably prove whatever they choose to conclude?

Mr. WEIDENBAUM. I would like to offer some comment and Dr. Miller might wish to amplify.

I have said to this committee as a private citizen that I think it is vital that an organization in Government that doesn't have a stake in the outcome of regulation set the ground rules for those analyses because given human nature, the regulators tend to overestimate the good they do and the regulated trend to overestimate the burdens that are imposed on them. That is why, very frankly, I am delighted to see Dr. Miller, an associate director of the Office of Management and Budget—a body that doesn't have regulatory responsibility—take the lead in developing benefit-costs and cost-effectiveness analysis.

One thing is vitally important if we have learned anything from the benefit-cost analysis that has been done on Government spending programs which goes back, as you know, close to the turn of the century. It is a need for an organization independent of the conduct of the regulatory process to set the ground rules and to review and monitor the analysis of the costs and benefits and effectiveness of regulation. And that certainly is the kind of mechanism that President Reagan has established and which Mr. Miller is attempting to carry out, I think, with initially gratifying results.

Chairman ROTH. Would you care to comment?

Mr. MILLER. Mr. Chairman, the only thing I would add to that very perceptive remark is that I don't want to say that benefit-cost analysis or cost-effectiveness analysis is going to supply the answer in every situation that that it is going to be infallible. We are going to make mistakes.

As a private citizen, also, I encouraged regulators and those in the Congress to consider that benefit-cost analysis, despite all of its disadvantages, is a lot further along toward our goal than what the agencies are doing now.

The world is not perfect and it never will be. The question is not to seek some perfect system out there. What we have to do is to seek something that is less imperfect than what we have today. I think benefit-cost analysis gets us a long way toward the goal of perfection, but I will not try to characterize it as a perfect mechanism.

Chairman ROTH. Going back to the question of deregulation, I would like to have your further comments as to what extent or potentially in what ways might this legislation delay future deregulation efforts. I think it was 10 years ago we had something like 10,000 to 15,000 pages in the Code of Federal Regulations. Today we have over 80,000. So I assume that a major thrust of the administration is going to be in the direction to eliminate those that are not essential or seen as helpful.

Do you feel that this proposed legislation will help you in this effort or could it be used as an obstacle to delay deregulation?

Mr. MILLER. Senator, I think on the whole it is very helpful provided it meets the kinds of concerns that we mentioned in our testimony.

I think Mr. Gray might have a comment. Do you want to amplify on that?

Mr. GRAY. Part of the key to it, I believe, Mr. Chairman, is the flexibility that both Mr. Weidenbaum and Mr. Miller testified to. We wouldn't, for example, in a rule involving the certification process that automobiles have had to go through to comply with mandated mileage standards, we wouldn't want to have to require the lengthy cost-benefit analysis of any consideration to eliminate that because without doubt if the companies are ahead in the competition, they are way ahead of the statute.

There is no point in trying to figure out what the paperwork costs are. They are very, very substantial but there is no point in going through that analysis. The rule ought to be eliminated as rapidly as possible. We are concerned that that kind of thing would get hung up without the kind of flexibility that we have all testified is necessary.

I think likewise in connection with certain parts of the Bumpers Amendment that elimination of certain presumptions, changes in the review standard, could just at a minimum, create litigation and confusion which could cause rules to be hung up in court and thereby complicate the deregulatory process.

Mr. MILLER. Mr. Chairman, our major concern at this moment is how this act might tie the hands of the Administration with respect to achieving a regulatory relief in an orderly fashion under the Executive order. I mean to what extent would the provisions of this Act preempt the President from establishing principles and mechanisms for review of new and existing regulations? That is of substantial concern to us. We also note that the way the bill is Written, it arguably exempts a substantial portion of OSHA regulation and some portion of EPA regulations.

With the existence of the Act being interpreted by the courts of this bill, if passed, as meaning the President could not impose requirements under Executive orders such as has been applied today by President Reagan. We are concerned about these things and some of the judgment of some very skillful attorneys is that the question is not clear. So we would urge, sir, that this be clarified in any legislation.

I think you would agree that the President ought to have the authority to except the kinds of requirements that are under the Executive order and you wouldn't want this bill to intrude upon that authority.

Chairman ROTH. We are going to have a series of votes. So we will be playing bouncing ball, I guess, up here. But I would rather try to have the various Senators go and vote and return and ask the questions the best we can.

At this time I call on Senator Mattingly.

Senator MATTINGLY. This will be a 1-minute question. Thank you, Mr. Chairman.

This will be addressed to both of you.

Senator Roth made the comment that we now have somewhere between 10,000 to 80,000 regulations. Obviously, we know that adds to the cost of doing business. So there is nothing hidden out there in the private sector. We all know what is happening, there is not anything mysterious.

One question I would like to ask: I assume you do support this legislation, but for both you, Mr. Weidenbaum and Mr. Miller, will you comment about the lack of the waiver power. The reason I would like to ask you about that is because I feel this will be good economics, I feel, the timing of giving regulatory relief is going to be important for States and local governments to institute block grants and whatever else the new type of funding that would be coming down.

What I would like to ask you in this respect, talking about cost and everything, is could you give a recommendation now on the waiver that you are talking about that could be incorporated possibly in this legislation? I think this may be a key element that needs to be added.

Mr. WEIDENBAUM. If I may, Senator Mattingly, give the basic reason for the waiver request and ask Dr. Miller to give the specifics, I think we are all concerned about the benefits of benefit-cost analysis and if some sensible procedure doesn't draw the line I could envision situations where you spend more money and time doing the analysis than the cost of operating the entire regulation. So some screening device as to which proposed regulations should be reviewed and which shouldn't is essential to make the review process workable.

Otherwise, you get the bureaucratic response of cutting up regulations so finely that if you are reviewing a maior substantive regulation, you bog down the review process with the review of an almost infinite set of details. I speak as an ex-bureaucrat who thinks he knows how to beat the system if given the opportunity.

So you can get such an infinite array of fine regulations to be reviewed that literally the thrust of the process would be circumvented.

Mr. MILLER. I certainly agree with that point. I think obviously there is a trade off here. If you grant waiver authority, it could be abused. You need to have careful oversight of the exercise of that waiver authority. I would encourage you to consider giving a blanket waiver authority to the Director of OMB. But the reason I feel comfortable in making that recommendation goes back to what Dr. Weidenbaum articulated earlier; that is, the important thing is that that waiver authority be invested in someone who doesn't have a stake in the process of regulation but that is a neutral observer and a judge and if anything is going to look at the regulation with somewhat a questioning attitude.

From one administration to the other, I think we can characterize the Office of Management and Budget as looking upon agency behavior and agency actions with a fairly stern look. I think that would continue. So I doubt you would find this waiver authority being abused from one administration to the next. But I would encourage careful oversight of such waiver authority.

Senator MATTINGLY. Would you recommend that be part of this legislation?

Mr. MILLER. Yes, sir; I would.

Senator MATTINGLY. Could you provide the terminology?

Mr. MILLER. We would be happy to work with your staff, sir.

Senator MATTINGLY. So that we might have this to consider.

Mr. MILLER. We will be happy to work with the staff of this committee in that regard.

Senator MATTINGLY. I would suggest we do that right away.

Chairman ROTH. I will ask an additional questions, if I may. Do I basically understand your position being that within the executive branch you have adequate authority to do what you think is necessary even though you recommend that we build into the law these procedures for the long-term course?

Mr. MILLER. Yes, sir.

Chairman ROTH. But that is outside of the independent agencies where your authority is lacking?

Mr. MILLER. That is correct.

Chairman ROTH. Let me ask you:

Do you think this legislation would provide the tools you need with respect to creating a cohesive mass of regulations throughout government? For example, one of the problems in government today is because the way we have splintered it, we have so subdivided authority between independent agencies as well as within the executive branch that many people think it very difficult to develop a cohesive economic policy.

One of the reasons it is so difficult is that the regulatory system is such that many agencies both within the executive branch and the independent go their own direction so that we have created an environment of no growth or stagnation rather than of growth.

Do you see this legislation really addressing that problem?

Mr. WEIDENBAUM. Mr. Chairman, I think this legislation, given the types of amendments that Dr. Miller and I have suggested, would be a constructive addition to the tool kit of regulatory control, but very frankly I think we need to be aware of the problem of statutory restrictions and statutory authority.

Chairman ROTH. I hate to do this but I think I had better run and vote and we will resume in just a couple of minutes. Thank you.

[Brief recess taken.]

Senator COHEN. We are going to try and proceed as best we can. There are two more votes following the one currently on the floor right now. Senator Rudman and I will try to pose several questions to you and keep it going as long as we can before we have to run and vote.

This raises the question in my mind as to what the proper role of Congress ought to be. For example during the past 4 years we have had regulatory activism on the part of the administration. During the next 4 years I suspect that you might come before this committee and support some of the very measures that you now would oppose; namely, legislative veto and restrictions upon implementation of rules and regulations. On the one hand if you have an activist attitude on the part of the White House you might urge one course of action for Congress. Now that you have a conservative attitude in the White House you urge congressional restraint and lack of intervention in these areas.

It raises the question of what is the proper role in Congress in terms of regulatory review and policymaking. For example, I have a question about the constitutional dimensions of this problem. If Congress has the constitutional authority to delegate rulemaking power to the executive branch, why wouldn't it have the ability to limit the amount of power that it delegates?

If, for example, we could say you have no power in this instance, why couldn't we say you have so much power but you must come back to Congress in 60 days for review. Is there in your judgment any restriction upon Congress putting limitations on what it delegates to the executive branch?

Mr. MILLER. Senator, first let me address the point. The remark, I think, is on target. I testified for some of the measures that I am suggesting modifications be made. My major concern at that time was that I saw those measures as being perhaps the only possibility for reining in regulatory excess. As you have mentioned, the Reagan administration has embarked upon a multifaceted program with real teeth, a program that we are learning can succeed. The kind of program that I think S. 1080 incorporates can work to achieve the basic intent of the kinds of provisions that I was encouraging several years ago.

With respect to the question of direction, of course when Congress passes legislation giving certain quasi-legislative authority to agencies, it circumscribes that authority. Sometimes in my judgment it circumscribes that authority too much. It permits agencies to promulgate regulations that don't make a lot of sense. So there is first this set of limits on agency authority. But beyond that you are asking me to address an issue that would fall within the areas that cause attorneys a great deal of difficulty with respect to the division of power between the judiciary, the legislative, and the executive branches.

Sir, I am simply not equipped to answer that question. Mr. Gray, a scholar of considerable note in that area, may wish to make a comment.

Mr. GRAY. I think discretion or caution because the Department of Justice gets very upset when anybody speaks to this issue on legal grounds but I think you put your finger on it, Senator Cohen, on the tail end of your question which is that perhaps the proper way to do it is be more careful when the laws are enacted rather than trying to pull it back after it has gone through the process. But from the policy point of view, one problem is it is ad hoc, it is scattered. It can only go with one rule which seems to be a part of a seemless web of rule and in our view can perhaps act as substitute.

Senator COHEN. But your rulemaking is also ad hoc because you are analyzing each agency, each rule itself. You don't take a broad policy.

Mr. GRAY. To the contrary, Senator, I think that the purpose of Executive orders and OMB task force is to provide the oversight which can look at EPA, look at DOE, say the two are doing things that are inconsistent.

Senator COHEN. But you are arguing for flexibility, a means to give you the opportunity to examine each particular agency or proposed rule on an ad hoc basis, aren't you?

Mr. GRAY. Yes, on an ad hoc basis, but in the context of relating separate agencies together. That is one of the things that we can do that a single agency can't. There are lots between agencies where there is conflict and duplication.

We can take a look at that at the level at which we will operate. The point I was trying to make, though, is what needs reviewed are the underlying statutes viewed as a whole; like the Clean Air Act, you can't go into the Clean Air Act and look at one rule. It is enormously complicated.

Senator COHEN. Let me just tell you for example the presumption of regularity. Last year I voted against erasing this presumption of regularity on the part of administrative agencies probably for a different reason than what you are advocating here. It was my judgment that Congress had been neglecting its oversight duties. The Congress does not know what kinds of laws it has passed, whether the grants of authority were too large, and whether the agency had gone well beyond the intent of Congress itself. I felt eliminating this presumption of regularity was in effect passing that responsibility over to the judiciary. We were then delegating that authority not to the executive, but to the judicial branch as opposed to keeping it right in Congress where I thought it belonged.

There is a somewhat different view I think than you hold at this point in terms of the presumption of regularity, as you see it. If you interfere with that at this point you are going to cause more confusion, more delay and less of an ability to carry out the specific regulatory policies that you might consider.

Mr. MILLER. Senator Cohen, despite my disavowal of any expertise in this area, let me go ahead and say something about it. I think we view some of the techniques developed by the Executive order and some of the technical modifications that we have advocated in the bill as being devices to allow the President better to manage the regulatory process and to insist upon the agencies conforming with the laws, and with the intent of Congress and within the discretion allowed beyond that comporting with the principles that the President wishes to enunciate. So it is more a technique of managing an appropriate executive function.

Senator COHEN. What is the proper role of Congress in the regulatory process? Is it to wait and see what the performance of the administration is with respect to the implementation of the rules, of laws passed by the Congress? Is that the proper role you are suggesting? In other words, if you see the Carter administration is too active, we take certain corrective actions at the legislative level, we see the Reagan administration is too conservative, therefore consist with the general philosophy of the Senate, then we allow it? Is that the proper role?

Mr. WEIDENBAUM. Let me suggest there is a powerful, very activist, underutilized role on the part of the Congress and that is oversight of that mass of statutes that are already on the books. These statutes generate all the regulations and all of us who just examine the sheer overpowering mass of those statutes come away with the compelling belief that it is high time that Congress reviews and—to my way of thinking—cuts back the underlying statutory maze.

Senator COHEN. Would you support then the initial consideration in the Roth-Laxalt bill for a sunset provision that would have regulations expire every 5 years?

Mr. WEIDENBAUM. As I said in my statement I think the sunset provisions of the bill are a powerful constructive part of the bill. I endorse them strongly.

Senator COHEN. I am going to yield to Senator Rudman because within 2 to 3 minutes we have to go vote.

Senator RUDMAN. Dr. Miller, just very briefly in your statement, you set forth the President's essential regulatory principles and you of course have made reference there and a number of other places to the cost-benefit relationship of these regulations. We all understand that very clearly.

But it seems to me that you have not addressed in a specific way how those words apply or don't apply in those areas which are life threatening, where cost-benefit in the traditional sense truly means nothing. I am talking about EPA regulations regarding hazardous and toxic wastes which we unfortunately have had some extraordinarily bad experiences with, in some cases due to lack of regulation.

I am talking about the Federal Aviation Administration, some of its regulations that could in no way be defended as cost-benefit effective, except in those cases where loss of life is involved. How do you square those principles, how do you carve out an exception in these areas which I think many people are concerned about who essentially concur with the President's essential approach to this problem?

Mr. MILLER. Senator, you have identified the most difficult area of benefit-cost analysis. Let me say, hasten to add, however, that I think a properly done benefit-cost analysis, especially a good quality cost effectiveness analysis, can mean substantial improvements in the performance of agencies when they address these life threatening issues. There are opportunities that agencies have for reducing the probability of adverse consequences, be it loss of limb, be it disease, or be it death by reallocating resources based on the results of such analysis.

Basically benefit-cost analysis, the thrust is to say that an agency should make decisions based on knowledge of the ramifications of their proposed rules and knowledge of the ramifications of alternative rules. It is not a black box from which out cranks a number that tells the agency yes or no, up or down. But it is a useful, extraordinary, powerful tool for making informed decisions.

Senator, I have often used the analogy of two piles of sand. We all know that in the analysis of some of these issues there are benefits that can be measured reasonably and there are those that can be simply identified but not quantified. There are costs that can be measured well and there are costs that cannot be quantified very well.

But if you have two large piles of sand on this table of reasonable comparable size, just eyeballing you wouldn't be able to see which was the largest. But if you took a glass full of sand from each pile in sequence, as the absolute sizes of the piles decreased, the relative sizes would become more apparent. If you do a benefit-cost analysis and can subtract those benefits and costs that can be identified and can be quantified reasonably easily this allows the decisionmaker to focus on those subjective benefits and costs and make a more informed decision. That is the thrust of benefit-cost analysis and the importance of it in these sensitive areas.

Senator RUDMAN. I think unless I am going to set a new Guinness Book of Records of trips from here to the Capitol, we will have to suspend for probably 3 or 4 minutes.

Senator Roth will be back. He probably wants to vote on this and the next one and then we will be able to continue. So we will suspend here for just a few minutes.

[Brief recess taken.]

Chairman ROTH. The committee will please be in order.

Gentlemen, as most of you know this is not unusual but fairly typical of our process. At this time I would call upon Senator Levin for his questions.

OPENING STATEMENT OF SENATOR LEVIN

Senator **Levin**. Thank you, Mr. Chairman.

I add my note of commendation. Some of the regulatory reform issues are long overdue and we hope at last we will be able to do something major in this area. We have done a few things in the last few years but nothing that I would consider as comprehensive as this legislation. I think that is why it has commanded the support of 50 or 60 cosponsors, whatever the number is.

There are some unanswered questions in that legislation, however. First, I would think not necessarily in terms of priority, but a question that I have been actively involved in, is the legislative veto issue. I would like to clarify some of the administration's thinking on that. Dave Stockman, when he was here in January, said that he thought the legislative veto was a good idea. In fact, he said he thought it was an imperative idea. I am wondering whether or not that is reflective of the administration's position, that some form of legislative veto is an imperative idea.

Mr. **Miller**. Senator, I think the position that I have outlined for you comports reasonably well with the position you have attributed to Mr. Stockman. I do think, in fact I know, that it reflects the President's thinking on the matter.

Senator **Levin**. There are a number of approaches that we are looking at for legislative veto. Basically there is an approach which includes the President and there is an approach which excludes the President. The approach which excludes the President has been called, variously, a one or one and a half or even a two-house veto by a concurrent resolution, all of those mechanisms exclude the President. The mechanism in the so-called Levin-Boren bill is an effective delay mechanism which allows the selection by committee of just a few of the regulations; so that the Congress would have a real practical way of exercising its legislative authority with the President involved in that mechanism because the President is involved in legislation as you know, in the ordinary course.

I don't see any alternative between those two major approaches, one that either does include the President or one that doesn't. The Attorney General has taken a very strong position against any mechanism that excludes the President.

In testimony before the Judiciary Committee and in other statements the Attorney General has indicated very strong opposition based on the present clause, against any veto mechanism which excludes the President.

From the administration point of view it would seem to me logical that that leaves some approach which includes the President but which gives the Congress a practical way to review and veto regulations. I don't know of any practical way to do it except to allow a committee to delay specific regulations from going into effect so that the Congress can act on them legislatively.

We either allow that mechanism to operate or we would have to delay every major regulation automatically which would clog up things and I don't think that would be something supported by the administration, that is, to delay every regulation automatically. Without the committee trigger, that is the alternative.

I am just wondering would you agree with that analysis and if not where would you disagree with it?

Mr. **Weidenbaum**. I would like to make the observation that there are two fundamental powers that Congress has in that situation, Senator. First of all, there is the oversight on the part of the substantive committee extending to each of those regulatory agencies and second of these is the review of the Appropriations Committee. So the total effort of each regulatory agency is reviewed in this double-barreled way by both the Appropriations Committee and by the Substantive Committee and the entire agency and its regulatory program can be held accountable.

Senator **Levin**. Neither one of those is legislative veto. The question is whether or not there is going to be any mechanism promised by the President during the campaign, supported by OMB here in January and as apparently the President continues to support, some mechanism of legislative veto. Neither of the ones you just identified are legislative veto mechanisms. Again, I look at the two alternatives out there and I only see two, maybe I should see three, four, five, I would like to know what three, four and five are if there are others, but all I can see is one that permits the Congress to veto the legislation before it comes into effect, either, by the one, the one-and-a-half, or the two-House veto approach without the President or through some kind of a delay mechanism which would include the President but which would allow the Congress some practical way to look at the major regulations. Looking at that second alternative again, it seems to me that there are only two ways to go at it: Either delay everything which can't raise any constitutional issues, but it is often, it seems to me, unwise administratively to delay everything just so we can have a practical way to look at a few rules; or we could selectively allow a committee to delay the effective date of those rules coming into effect for a reasonable period of time as an internal, legislative matter. Just to delay, so that we have a chance to look at those few selected rules.

Mr. **Weidenbaum**. As I recall it, the President, during the campaign, talked in terms of legislative and executive veto of regulation which is why I think the language described by Dr. Miller in his statement making the distinction between independent agencies and other agencies is in the spirit of the President's earlier statement.

Senator **Levin**. I am not getting to that distinction for a moment. I would like to get at that if I still have time, but I would like Dr. Miller's comment on the analysis I have just given.

Do you see any other ways to have a practical legislative veto except through one of those alternatives that I have outlined?

Mr. **Miller**. I am not an expert on these various institutional arrangements. I would simply restate that the President is opposed to a legislative veto affecting the executive branch agencies of any House variety, as both a policy matter and the question of its constitutionality. With respect to selected independent agencies, he is not opposed. In fact, he may well favor legislative veto as a policy matter, but still reserve the right to challenge it in the court although I would not anticipate that the Department of Justice would seek out such cases to bring to court.

With respect to what particular kinds of legislative veto he would accept or encourage, I think that depends somewhat on this gradation you are talking about, least desirable from his standpoint, I should imagine would be a one-House veto that did not involve participation by the President.

Most desirable would be something akin to the proposal you have sponsored, Senator Levin, something that involves the President and involves both Houses.

So beyond that, though, I think it would be best to discuss the matter with the Department of Justice. Those people are more expert on various of these proposals.

Senator **Levin**. On that gradation between the one-House veto and the two Houses, including the President, that you have just described, would that be true for both policy matter and constitutional matters or just for a policy matter?

Mr. **Miller**. I think the position of the Department of Justice is that the legislative veto provisions, even the extreme of the version that you have proposed, Senator, is unconstitutional. So my comments were really directed to the policy matter.

Senator **Levin**. From the policy point of view, would the least attractive be the one-House veto, and the most attractive from a policy point of view, would be the two-House veto with the President involved?

Mr. **Miller**. Yes.

Senator **Levin**. Mr. Chairman, if I have another minute—I may be over—I would like to get into the distinction between the independent regulatory agencies and the executive branch agencies.

Just briefly, I am wondering if you are familiar with the New York Law Review article written by Jack Javits, dated June 1977, discussing this distinction. If not, I would urge you to take a look at it. It is rather lengthy and rather detailed but I think it is a very comprehensive analysis on the distinction between executive agencies and independent regulatory agencies. His conclusion is that the constitutional issue is raised when you try to apply legislative veto to the independent regulatory agency. Just reading briefly from here:

> The constitutional foundation for possible enactment of congressional review of lawmaking by independent regulatory agencies is considerably weaker than the supporting congressional review of proposals by purely executive agencies.

It is an article which I would commend to you. One other conclusion on page 490, the article isn't quite that long, that is the volume page, but regardless of which presentation clause is adopted, Javits wrote, consideration of the constitutional balance among the branches of Government militates against congressional review of independent agency activities.

It is a very comprehensive article. I would again urge you to take a look at it. I have some additional questions, Mr. Chairman, but my time is up.

Chairman **Roth**. Just one comment on this question of legislative veto, an issue on which I have an open mind. But I would urge your group, as policymakers, to study this carefully. I think it is more than a legal question. I am a lawyer, but I am not a constitutional expert, but it is sort of my offhand reaction that the constitutional argument is really raised to justify the policy decision.

I think we all remember in our history books that in the 1930's there were serious questions as to whether Congress could delegate certain administrative power to the executive branch. It is not strange to believe that as the membership of the Supreme Court changed, such delegations became more and more acceptable. I am not sure that the parallel isn't here.

What the courts will ultimately decide on the constitutionality of a veto probably depends upon who are the nine old men and possibly ladies on the bench at that particular time.

So I think that the important question is what is right from the standpoint of good government. I think the important question is not only how does it impact upon this administration, but, frankly, it is the approach too often, if I may be candid, of staffs of whatever administration. I have sat here in Congress many years now and have seen the concern at one stage where we had an "Imperial White House" and that we had to get Congress more into the decisionmaking.

I happen to think there was some merit in that criticism. At the same time, I am also of the belief that it makes no sense to so paralyze Government that it has no decisionmaking ability. I am not persuaded that some kind of a legislative veto is inconsistent with the latter goal.

So I would urge you people to give some careful thought to this because this is a matter that a number of very able Members of Congress on both sides of the political aisle support. Those members feel that this can be developed in such a manner as to insure Congress an effective say without interfering with the decisionmaking ability of the Federal Government.

So I don't think it is enough to just say that we are opposed to it, because it is going to be considered, and seriously considered, I am sure, on both sides of the Congress.

I have a number of questions from some members of the panel who could not be here today. So we would ask you gentlemen to be available to answer in writing their questions in writing.

Mr. **Weidenbaum**. We will be pleased to do so.

Chairman **Roth**. Senator Rudman?

Senator **Rudman**. I had a question earlier. I would like to yield to the Senator from Michigan.

Senator **Levin**. No. I will be here anyway. Thank you.

Senator **Rudman**. I will yield back to you, Mr. Chairman, at this time. I have no further questions at this time.

Chairman **Roth**. Gentlemen, I raised this question of coherent policy prior to my running off to vote. Would you like to proceed on that matter?

Mr. **Miller**. Senator, would you restate the question?

Chairman **Roth**. One of my concerns in effective decisionmaking is with the way we splintered our Government partly between so-called independent agencies as well as regulatory agencies within the executive branch. It appears that it may be very difficult to expeditiously create a cohesive economic policy for the Government.

Do you think that this legislation will help in this area? Do you think we need further legislation to insure that the executive branch is able to develop a cohesive policy? Last year I introduced a bill based on concepts developed by Mr. Cutler, the attorney-adviser to Mr. Carter, which would grant the President certain authority within the confines of the law to intrude in the regulatory process of all agencies, including independent. The legislation currently before the committee does not really address that problem.

I may not wish to address this issue, but I just wonder how serious a problem, Mr. Weidenbaum, you feel this problem is?

Mr. WEIDENBAUM. I think, Mr. Chairman, you raised an issue that truly has to be faced. I think President Reagan has put into place two mechanisms that point us in the right direction; that is, the Vice President's Task Force setting the general policies and the Office of Management and Budget headed by Dr. Miller, to carry out those policies. But let me give you an example of what I think is down the road. Let's look at the definition of what is a toxic substance, the definition of a carcinogen subject to regulation.

Reviewing the various regulatory statutes you see no consistency. You see a great deal of variety in what is toxic, what is carcinogenic. There is no effort by the administrative branch—perhaps there shouldn't be any—to develop consistency here.

What I would hope that the Task Force will develop with the assistance of Dr. Miller's office is some proposed general guidelines for developing regulatory statutes. As we develop the analysis of the Clean Air Act, I think we are going to be facing these generic program issues dealing with the various social regulations affecting health and safety.

I believe that the Congress will have the opportunity, especially when it reviews the Clean Air Act, to set some precedents which could very well be followed in the other social regulatory programs. But such consistency is not now apparent in that whole conglomeration of regulatory statutes, each of which was developed from a different perspective in a different time period.

Mr. GRAY. I don't think we view the problem as being a question of lack of Presidential power. To the extent that individual organic statutes permit, we think the President has ample authority for himself and to give to his designees, such as OMB, and the Task Force.

We think that is ample. I think that Judge Wald's opinion recently in the *Sierra Club* case, vis-a-vis the executive branch agencies, bears that out.

Perhaps the authority of the President over the independent agencies is less. But they do not very much tend to relate or impinge upon what the executive branch agencies do.

There are some points of intersection, cross-cutting, the Nuclear Regulatory Commission, SEC, sometimes in the IRS. But by and large, the independent agencies themselves tend to be self-contained economic ratemaking agencies with little impact on the health and safety agencies that are in the executive branch and the rules that they issue can be more self-contained and less interrelated with the other rules and that is one reason why the legislative veto applied makes more sense than the complicated piece of legislation like the Clean Air Act. But the point that Professor Weidenbaum was making is very true. In the area of these serious health problems, there is no, or very little continuity.

The concepts of unreasonable risk are well known in the scientific community, as expressed in the Toxic Substances Control Act, and in other acts, but in the Clean Air Act it is not recognized at all.

What is talked about there is safety, which has very little understanding in the scientific community.

What has to be done, I think, is to go to these organic statutes and try to get some commonality of approach. That is something that cannot be done anywhere in the executive branch without a change in the statutory language.

I don't mean to suggest that you take, that the answer is to take out of the Toxic Substance Controls Act, those concepts and put it in the Clean Air Act. But I think those have to be reviewed in that context.

Chairman ROTH. I am interested in your comments on the independent agencies. I have to admit that I am not certain I entirely agree with you. I think in many of those areas that have a very direct impact on the policymaking ability of Government, there is considerable overlap. Perhaps it is a price we have to pay in those areas where we want true independence.

Nevertheless, I for one am concerned on occasion. Take the area of trade. I think those enforcing our antitrust laws have in many ways forgotten or not recognized, that we are in a one-world market. I am not sure that the executive branch is in much of a position to influence the independent agency that enforces that. Perhaps the answer should come from the Congress.

But I would personally question whether across the Government spectrum, including the independent, as well as some of the executive, any administration, that is elected to bring about a change of direction, can do so very readily.

So I must confess that I think there is a great deal to Mr. Cutler's approach, although it may not be the ultimate answer.

Senator Levin?

Senator LEVIN. Thank you, Mr. Chairman.

I would like to ask a few questions about the Executive order and the power of OMB, which the Executive order granted to it, and what you are recommending in this bill.

The Executive order you referred to grants great centralized authority to the OMB, and I think there are some argument for that providing there is some boundaries to it. For example, I am not sure what happens in the case of an inability of the OMB and the agency to reach a conclusion. It just bounces back and forth, it seems to me, for an awful lot of time. That is one problem.

The major problem, I think, is the question of whether or not the OMB's role is going to be made public. Whether that role will be available to the public or whether the communications between the OMB and the agency are going to be ex parte communications.

You have taken care of that on phase 2 of the procedure under the Executive order, so that after the rule is published, it is final and after the public comment period begins, anything between OMB at that point, that goes to the agency must be made public. But there are no such provisions in the Executive order for OMB comment prior to that first notice of the proposed rulemaking.

There, it seems to me, we have got a very, very critical question as to whether or not that kind of an input, which is obviously so significant in terms of what is in that rule, should be made public.

The kind of communications which are going to be received by the OMB are going to be significant. I presume that everybody who calls the White House, who says, HUD is proposing a rule or some other agency is proposing a rule, is going to be referred to the OMB and the OMB is then going to be the recipient of hundreds, thousands, hundreds of thousands, maybe, of phone calls.

Mr. MILLER. Let's hope not.

Senator LEVIN. It used to be that the White House would say, "Hey, that is up to the agency." But now under the Executive order, the OMB is fair game, I would guess, for anyone who wants to make a phone call, to try to produce a certain result.

Those ex parte communications to the OMB are not, I presume, going to be made public. That troubles me a bit. What troubles me even more is the fact that the OMB communications to the agency prior to the publication of the notice of rulemaking are not according to the Executive order made public.

I would ask you, let me just read, also, one summary of the court decision on this matter. That is the *Home Box Office* case which is a court of appeals decision, which says the communications which are received by the agency prior to issuance of formal notice of rulemaking do not in general have to be put in public file. But if the information contained in such communication forms the basis for agency action, then that information must be disclosed to the public in some form.

I am wondering in light of that opinion whether or not we should require OMB's communications to the agency prior to the publication of notice of rulemaking to be made part of the file after the notice is published.

Mr. MILLER. In terms of the bouncing back and forth, under the Executive order the agency makes its analysis transmits to us a copy of its analysis and its proposed regulation, or its final regulation, and OMB will consult with the agency.

If there is substantial disagreement, then it will be considered by the Task Force on Regulatory Relief, which is chaired by the Vice President, of which Professor Weidenbaum is a member. It would be resolved at that level. We would not anticipate any substantial bouncing back and forth. Usually it would be the case, I would imagine, that the differences would be reconciled very quickly.

On the other hand, you point to a very significant area, an area to which we have given a lot of thought. Let's first talk about the communications after a proposal has appeared in the Federal Register.

As the Vice President indicated in his discussions with the press and other communications, we are in a mode of openness, candor and formal transmittal of information and assurance that information given to us has been formally transmitted to the agencies involved.

We are insisting upon that. We will be releasing shortly formal guidelines for the use of my office outside parties with respect to contacts with my office about views they have regarding certain matters.

I even get to the point that sometimes when someone comes in to visit and says hello, how are you, I say, have you told the agency that? The important thing is that any interested group, be it consumer group, business group, labor group, in giving us information, that they also have transmitted such information already to the agency and that the agency puts it in the record.

Senator **Levin**. That is after the notice.

Mr. **Miller**. That is after the notice.

Now let's address the question.

Mr. Gray can correct me here because my memory may be faulty. My understanding is that the Executive order does not require a formal record to be kept of communications between my office, between the Task Force, and the agency heads or agency officials on these matters before they appear in the Federal Register. However, it is at the discretion of the agency. If the agency wishes to put such information in the formal record, it can do so. We have no authority over the agencies in that regard.

As you read in the *Home Box Office* decision, it would seem reasonably clear that if a communication were of the type containing information, let's say, rather than policy guidance, and an agency relied on that information in making its decision about the proposed standard or especially about the final standard, then that would be put in the record.

I would request, though, that we allow Mr. Gray a chance to respond.

Mr. **Gray**. Senator Levin, our approach, as Dr. Miller suggested, anytime we supply factual information to an agency, especially if we are acting as a so-called conduit for an outside group, we would very much expect that information be placed in the record. We don't feel obligated to summarize policy discussions, discussions not imparting factual information, but merely discussions of what the record does in fact entail. We do not see any need to put that in the record or log it.

I believe that the recent *Sierra Club* case supports this approach that we have taken.

Mr. **Miller**. Could I also indicate, Senator, that we wish to stress very strongly that we could certainly be hamstrung completely. Our whole process could come to a halt if significant requirements were put upon us to maintain dockets, files, and records of every communication that was given to us. It makes it a lot easier for us to simply make sure that the people who are approaching us and also give information in the docket to the agencies.

Senator **Levin**. My time has expired.

I wonder if the Chair would allow me to ask for one clarification of a statement which I think is consistent with the position of the Justice Department. I think it is important enough so that I would ask for 1 minute extra time.

You indicated there was some constitutional question about the joint resolution approach. Even, the Levin-Boren concept, that you thought might have some constitutional question, also, even though it is a two-House veto with the President, if I understood you correctly.

The Justice Department, testifying before the Subcommittee on Agency Administration of the Judiciary Committee, April 23, said, after saying that the one- and one-and-a-half-House veto and the concurrent resolution are unconstitutional, said that the best procedure, perhaps, would be the use of a joint congressional resolution providing an opportunity for a Presidential veto and a congressional override of that veto in the rare case in which it might occur. This method would be constitutionally appropriate and would include all elected officials in the process.

I am wondering if you would agree with that, or disagree with that?

Mr. MILLER. I am not a scholar of these matters, but I don't think there was any inconsistency. Any concerns with Levin-Boren is not what was just identified. A joint resolution that is subject to the Presidential veto and subject also to congressional override is the same as a law. But the Levin-Boren proposal provides for a trigger mechanism with the congressional committee taking the action to delay. It is my understanding that this provision troubles Justice from a constitutional standpoint.

Senator LEVIN. Thank you very much.

Chairman ROTH. Gentlemen, I thank you very much for being here with us today. We undoubtedly will have further questions. I would urge you to work with the committee as we mark up this legislation.

I would just say in closing that I think an extraordinarily important and primary interest in this committee is going to be that we somehow work our way out of this regulatory maze without sacrificing goals.

Mr. WEIDENBAUM. We share the chairman's views and appreciate the opportunity to be here.

Senator ROTH. Thank you very much.

[Mr. Weidenbaum's prepared statement, with an attachment, responses to written questions submitted by Senator Rudman; Mr. Miller's responses to written questions submitted by Senator Roth, and a letter, with attachments, to Senator Roth, dated September 10, 1981, follows:]

PREPARED STATEMENT OF MURRAY L. WEIDENBAUM

Mr. Chairman and Members of the Committee:

It is a pleasure to discuss with you the Administration's fast start on an unprecedented program of regulatory relief, and our mutual efforts to see to it that this momentum is maintained. The hearings before this and other Congressional Committees in the past have helped to create the receptive atmosphere in which needed initiatives can be considered fairly and seriously.

We are in broad agreement with the Congress on a great number of points.

1. The regulatory apparatus must be brought under better control, so that responsible Federal regulation -- where it is clearly necessary -- is once more the servant of the public interest, not its master.

2. We need to put the burdens of over regulation into perspective so that in the future the benefits derived from regulation will be at least commensurate with the costs imposed.

3. Regulatory reform is a key component of the President's Economic Recovery Program and must be successfully implemented as part of the fight against inflation and economic stagnation. I can not stress too emphatically the fact that this Administration -- from the President on down -- is dedicated to achieving meaningful and lasting regulatory reform, and that this effort is viewed as an equal partner with budgetary and monetary restraint in restoring our economic health.

Since January 20, 1981, an unprecedented program of regulatory relief has been launched by the Reagan Administration. After nearly four months, it seems appropriate to take stock of the changes that have been made.

The Regulatory Scoreboard

Let us look at the facts as shown in what we can call our regulatory scoreboard:

- We are taking 34 specific regulatory actions and proposing one legislative change that will save the American motorist $9.3 billion and free up $1.3 billion in automobile industry capital outlays over the next five years.
- We have withdrawn, postponed, or rescinded 7 major regulatory proposals of the previous administration. Two of those rules alone would have imposed costs in excess of $100 million a year.
- We have postponed an additional 36 rules that were caught up in our initial freeze of some 172 "midnight" regulations developed by the previous Administration.
- We have ordered 13 departments and agencies to conduct intensive reviews of 27 major existing rules, ranging from testing procedures for new drugs to waste water treatment standards.
- We have revoked two Presidential directives, one of which imposed onerous burdens on American exporters and another mandating an extraordinarily inefficient approach to building temperature control.

- We have abolished, by Executive Order, the prior Administration's Council on Wage and Price Stability, eliminating the paperwork and regulatory burdens resulting from that agency.
- We have issued and Executive Order decontrolling crude oil prices and abolishing the cumbersome and inefficient entitlements programs.
- We have taken three major procedural actions: our initial 60-day regulatory freeze, the establishment of the Vice President's Regulatory Task Force, and an Executive Order that specifies the use of cost-effective alternatives for achieving regulatory objectives.

All in all, by my estimate we have taken 106 significant regulatory actions, revoked or issued five Presidential directives involving regulatory relief, and established an on-going high level Administration Task Force. That surely is an unprecedented set of actions in a four-month period. More fundamentally, it provides a striking change from previous Administrations which were characterized by rapid growth of regulatory activities. A copy of our April 23 Progress Report on Regulatory Relief is attached.

The Principles of Regulatory Relief

Our philosophy is to halt decisively the intrusion of the Federal government into the lives of our citizens, into the decisions of our businessmen, and into the choices faced by ten of thousands of state and local government officials and administrators. As a general rule, we simply do not believe that workers, managers, investors and administrators need the Federal government to make reasoned and intelligent decisions about how best to organize and run their own lives and their daily activities.

By our actions we are removing Federal mandates forcing business firms, educational institutions, and state and local governments to spend billions of dollar of scarce revenues to provide services and products for which there is little or no genuine demand. By removing these mandates, we are providing the average citizen with greater freedom to choose, a lower rate of inflation and the potential for larger after-tax incomes. Let no one say that regulatory reform is playing second fiddle in the President's economic recovery program.

Regulatory reform is good economics: less costly and more sensible regulation will reduce uncertainty and delay in investment decisions. We also will be reducing business operating expenses which in turn means helping to make American industry more productive and competitive, reducing the prices of goods and services to American consumers, and helping to lower the rate of inflation.

Our initial efforts are only a beginning. There is so much that needs to be done after long years of neglect, that our efforts so far are just scratching the surface.

Since this is a new process, the tools and institutional mechanisms for carrying out regulatory reform are still being developed. So we need to improve and build upon what we have available to do the jobs as we go along.

I have drawn three lessons from our work so far that relate to the legislative initiatives before this Committee which I would like to share with you. All of these lessons are derived from the same basic point: regulatory reform is a learning process and thus there is great need for flexibility in order to incorporate new insights and develop more sophisticated tools.

Lesson number one is that we need administrative flexibility. Otherwise, a promising set of requirements could degenerate into meaningless paperwork using resources which could be put to more productive uses. For example, OMB's waiver power in the Executive Order -- allowing it to exempt certain agencies and regulations from parts of the Executive Order -- is every bit as important as its power to review Regulatory Impact Analyses. Otherwise, OMB could be overwhelmed by trivia to the detriment of exercising effective oversight. If the President is to be able to control the process of regulation, then he and his appointees must have the ability to tailor reviews to the appropriate level on a case-by-case basis.

The second lesson is that we are in the midst of an evolutionary process. It would be most unfortunate if legislation were to freeze this process of growth prior to its ultimate development. We must be alert to insist upon the use of new and more productive techniques in reviewing regulation and to remove procedures which are no longer appropriate.

The third lesson is to be wary of unintended consequences. Well intended legislation adopted in reaction to the shortcomings of previous Administrations could actually hinder the President's efforts at deregulation. We are concerned that inflexible legislative requirements could block new regulatory initiatives by agencies which could result in less regulation.

Turning to the details of the legislation now before the Committee, S.1080 impresses me as a constructive proposal on these regulatory reform matters about which we all feel so deeply. I hope that S. 1080 in its present form, as well as my remarks, can be seen as part of a needed dialogue about the best ways to effect significant reform. With that in mind, I'd like to make a few quick points:

o I am concerned about a possible permanent "locking-in" of regulatory analysis procedures. For examples there is no provisions here for an OMB waiver power -- which I believe necessary, for the reasons explained earlier. Nor has cost-benefit analysis yet been developed to the extent necessary to make it the exclusive basis for evaluating regulatory proposals.

o I am troubled about the potential for uncertainty and extended court intervention inherent in the revision of the Administrative Procedure Act, both with regard to presumptions of agency expertise and the prospective review by courts of agency compliance with legislative requirements. Section 3(f) (3) of the bill might be clarified to address those concerns directly.

o On the positive side, the sunset review provisions are most promising, also the venue provisions are an excellent way of dealing with the "race to the courthouse" problem.

In summary, I believe that S. 1080 is an important step forward in developing improved regulatory procedures.

Regarding S. 344, unfortunately I can't be as enthusiastic. This bill embodies a form of legislative veto about which the Administration has reached a strong, adverse conclusion. It is our belief that this provision is an unconstitutional intrusion on the President's authority to manage the Executive Branch of government and to see that the laws are faithfully executed. Although the Administration is not opposed to all Congressional veto provisions, and -- without giving up its duty to question the constitutionality of the matter in court -- could accept certain versions applying to selected "independent" agencies, it would be compelled to oppose vigorously any Congressional veto provision of the kind in S. 344 that applied to Executive Branch agencies.

Regarding another bill which has been introduced, H.R. 746, I will not go into detail here. I'd just like to say that I am in accord with the testimony that James Miller of the Office of Management and Budget delivered last week.

I hope that these points are helpful and taken in the spirit of cooperation in the regulatory reform effort.

A PROGRESS REPORT ON REGULATORY RELIEF

April 23, 1981

Since January 20, 1981, an unprecedented program of regulatory relief has been launched by the Reagan Administration After approximately three months, it seems appropriate to take stock of the changes that have been made.

The Regulatory Scoreboard

Let us look at the facts as shown in what we can call our regulatory scoreboard:

- We are taking 34 specific regulatory actions and proposing one legislative change that will save the American motorist $9.3 billion and free up $1.3 billion in automobile industry capital outlays over the next five years.
- We have withdrawn, postponed, or rescinded 7 major regulatory proposals of the previous administration. Two of those rules alone would have imposed costs in excess of $100 million a year.
- We have postponed an additional 36 rules that were caught up in our initial freeze of some 172 "midnight" regulations developed by the previous Administration.
- We have ordered 13 departments and agencies to conduct intensive reviews of 27 major existing rules, ranging from testing procedures for new drugs to waste water treatment standards.
- We have revoked two Presidential directives, one of which imposed onerous burdens on American exporters and another mandating an extraordinarily inefficient approach to building temperature control.

- We have abolished, by Executive Order, the prior Administration's Council on Wage and Price Stability, eliminating the paperwork and regulatory burdens resulting from that agency.
- We have issued an Executive Order decontrolling crude oil prices and abolishing the cumbersome and inefficient entitlements program.
- We have taken three major procedural actions: our initial 60-day regulatory freeze, the establishment of the Vice President's Regulatory Task Force, and an Executive Order that specifies the use of cost-effective alternatives for achieving regulatory objectives.

All in all, by my estimate we have taken 105 significant regulatory actions, revoked or issued five Presidential directives involving regulatory relief, and established an on-going, high level Administration Task Force (see Appendix). That surely is an unprecedented set of actions in a three-month period. More fundamentally, it provides a striking change from previous Administrations which were characterized by rapid growth of regulatory activities.

The Principles of Regulatory Relief

Our philosophy is to halt decisively the intrusion of the Federal government into the lives of our citizens, into the decisions of our businessmen, and into the choices faced by tens of thousands of state and local government officials and administrators. As a general rule, we simply do not believe that workers, managers, investors and administrators need the Federal government to make reasoned and intelligent decisions about how best to organize and run their own lives and their daily activities.

By our actions we are removing Federal mandates forcing business firms, educational institutions, and state and local governments to spend billions of dollars of scarce revenues to provide services and products for which there is little or no genuine demand. By removing these mandates, we are providing the average citizen with greater freedom to choose, a lower rate of inflation and the potential for larger after-tax incomes. Let no one say that regulatory reform is playing second fiddle in the President's economic recovery program.

Regulatory reform is good economics: less costly and more sensible regulation will reduce uncertainty and delays in investment decisions. We also will be reducing business operating expenses which in turn means helping to make American industry more productive and competitive, reducing the prices of goods and services to American consumers, and helping to lower the rate of inflation.

The Accomplishments of Regulatory Relief

A few examples of the specific regulatory actions we have taken illustrate the breadth and character of our regulatory relief program.

Auto Industry Regulations

The Administration's program to help the auto industry demonstrates the enormous potential impact on the American economy of regulatory relief. Specifically, the Environmental Protection Agency and the National Highway Traffic Safety Administration published in the Federal Register notices of intent to rescind, revise, or repropose a total of 34 specific regulations, ranging from rules specifying bumper strength to those governing exhaust emissions standards and certification procedures.

In addition, as part of the proposed amendments to the Clean Air Act, EPA will ask Congress to eliminate the requirement that all passenger cars meet 1984 emissions standards at higher altitudes.

Over a five year period, these actions alone will save the American motorist $9.3 billion in the cost of buying and operating cars and trucks. It will also release $1.3 billion in company funds which otherwise would have been invested in federallymandated equipment and facilities.

Regulatory relief for the auto industry will be an ongoing activity. In addition to our announced actions, the Administration is committed to review a variety of additional regulations that affect the auto industry as well as the statutes governing auto regulatory programs.

Labor Regulation

Another example of regulatory relief now being provided is the Labor Department's withdrawal of proposed rules requiring that chemicals in the workplace be labelled. Like so many regulations, the proposed rule was motivated by the best of intentions: protecting workers from hazardous materials. But the rule was excessive. Each and every container in a workplace with as little as one percent of a dangerous chemical -- including all drums, pipes, and reaction vessels -- would have needed an extensive label describing the contents and the possible hazards.

This rule, if issued in final form, would have cost between $643 million and $900 million initially and between $338 and $473 million a year thereafter, according to Labor Department figures. Industry sources contended that the true costs were substantially higher, and that in some factories the rule was wholly impractical. The Labor Department is now searching for a less costly and more effective means of assuring worker protection.

Environmental Regulation

Another example of regulatory relief is EPA holding up a new rule setting noise emissions standards for garbage trucks. This rule was not among EPA's most costly: only about $25 million a year would have been required to bring garbage trucks into compliance. But these costs, however, modest, are excessive relative to the benefits gained.

More important, garbage truck noise is a prime example of a problem where there is no compelling reason for Federal intervention. It is a local problem, varying from city to city. Local governments should be responsible for determining what, if anything, to do about it. Moreover, they should have flexibility in deciding how to respond. For example, altering truck routes and schedules to avoid residential neighborhoods in the early morning hours may be a better and cheaper solution in many cities than ordering expensive soundproofed trucks, as the EPA rule would have required nationwide.

Oil Decontrol

In energy, as in other areas, the Administration's policy is to rely wherever possible on the efficiency and discipline of the free market to achieve public purposes. Thus one of our first regulatory changes was to accelerate the decontrol of oil prices.

The crude oil entitlements program, which we terminated, was a classic example of a regulation that both harmed the economy as a whole and actually worked against our national energy goals. The entitlements program holds down domestic oil prices,subsidized the least efficient producers, discouraged the development of new sources of supply,frustrated energy conservation efforts, and wasted literally millions of barrels of oil in inefficient refinery operations. That program simultaneously increased our dependence on foreign oil.

Household Appliance Efficiency Standards

Other energy-related actions include the Department of Energy's withdrawal of proposed standards for the minimum energy efficiency of major household appliances, such as refrigerators and air conditioners. This proposed rule would have made a relatively minimal contribution at best to our overall energy consumption. Rising energy prices already give consumers strong incentives to reduce appliance use and to buy more energy efficient models. In addition, the government and industry have instituted an appliance labelling program, which facilitates informed consumer choice by providing information on expected lifetime energy costs for individual models.

Any energy savings that might have been achieved by this rule would have come at an enormous cost. The standards would have requried the complete redesign of virtually every appliance model by 1986. Appliance purchase prices would increase by $500 million a year, and this added expense would probably be only partly offset by lower lifetime energy costs. Finally, DOE estimated that many of the smaller manufacturers would not have the financial resources to make such rapid model changes, so that the rule would have eliminated perhaps the most competitive and innovative segment of the industry. Clearly there are more cost-effective ways to save energy.

Other Regulatory Relief

Additional concrete examples of the Administration's determination to move forward swiftly on the regulatory relief program include the following:

- On January 29, the President terminated the so-called "voluntary" wage and price standards program of the Council on Wage and Price Stability, thereby eliminating the paperwork and regulatory burdens imposed by that agency, which is being phased out entirely.
- DOE also withdrew proposed standby energy conservation rules that would have interfered

excessively in the daily life of workers and businesses and reduced their flexibility in devising means of conserving energy.

- The President revoked Executive Order 12264, which established a duplicative, cumbersome, and unnecessarily strict regulatory policy regarding the export of hazardous substances.
- The President rescinded mandatory Federal controls on non-residential building temperatures, to allow building operators to choose the methods of conserving energy that best suit their circumstances.
- The Secretary of Labor postponed implementation of new rules under the Service Contract Act which would have extended Davis-Bacon "prevailing wage" principles to employees in timber sales, data processing, and R&D and would have cost the government over $68 million a year.
- The Secretary of Education withdrew proposed rules that would have required all school systems to offer a particular form of bilingual instruction to children whose primary language is other than English, at an estimated cost of up to $1 billion over the first five years and between $72 and $157 million a year thereafter.

- The Department of Transportation delayed four regulations which would have imposed costly requirements on state and local governments, dictating how they conduct urban transportation planning, design traffic control devices, and rehabilitate or stockpile buses purchased with Federal aid.
- The Treasury Department postponed for reconsideration rules that would have imposed extensive new obligations on local governments that receive revenue sharing funds to prevent discrimination against the handicapped in services, employment, and access to facilities.
- The Interior Department halted the proposed listings of the Hawaiian tree snail, Gypsum Wild Buckwheat, and Todsens Pennyroyal as endangered species. Our overriding concern is that the American taxpayer not become an endangered species!

Three Procedural Reforms

In the first few months of his Administration, the President instituted three important procedural reforms to establish an effective process of regulatory relief. First, to provide leadership for the entire effort, he created a Cabinet-level Task Force on Regulatory Relief, chaired by Vice President George Bush. The Task Force has the principal responsibility for overseeing the entire process of regulatory reform, including reviewing existing and proposed regulations and evaluating the basic legislation authorizing regulatory programs.

Second, the President signed a new Executive Order requiring federal agencies to choose the most cost-effective alternative for achieving each regulatory objective. The Vice President's Task Force and the Office of Management and Budget are responsible for assuring that the agencies comply with this Order. Of course, the heads of the regulatory agencies very properly retain the basic responsibility for ensuring that regulations are appropriate and not burdensome. But additional support for this goal is now available from OMB and the Task Force on Regulatory Relief.

Third, the President ordered a sixty-day freeze on the horde of "midnight" regulations issued by the previous Administration. This suspension allowed time for us to determine which of those last minute rules were really warranted.

Looking Ahead

Our initial regulatory actions have been, by necessity, selective. We have concentrated on procedural changes, on the "midnight" regulations, and on rules that both threaten to impose immediate costs and can be changed quickly and administratively. Now we are beginning to broaden the scope of our regulatory relief efforts.

A particularly important future effort, will be our review of the Clean Air Act, which comes up for reauthorization this year. We are studying some key questions: To what extent can responsibilities for air pollution standard setting and enforcement be delegated to State and local governments? How can we streamline the regulatory process so as to improve its effectiveness? To what extent can the scientific base for the ambient air standards be improved? How can we encourage (or perhaps more realistically, do less to discourage) economic growth and energy development while furthering our environmental objectives? How can we in a practical way incorporate measures of benefits and costs in the regulatory process?

Quite clearly, these are not questions that lend themselves to easy or quick answers. But it may well be that the review of the Clean Air Act will lead to a fundamental rethinking of the entire process of social regulation, because the issues involved are, in various ways, also pertinent to clean water and hazardous waste disposal rules, toxic substances directives, and occupational safety and health regulation.

A Mistaken Concern about Regulatory Relief

The Administration's firm intention to review statutes and provide regulatory relief should not be mistaken for a lack of commitment to a cleaner environment on water or consumer safety. We will not "gut" the Clean Air Act or other worthwhile regulatory statutes. Regulation will continue under the Reagan Administration, because there are many worthwhile public goals that cannot be achieved without it. But we need to make the regulatory programs work better. And thus respond constructively to the legitimate criticism which has been leveled at the entire regulatory apparatus. The fact is that our current system of regulation is often so perverse and heavy handed that significant regulatory relief can be provided without compromising safety or a clean environment.

Some examples from the auto regulatory relief package may help clarify how this can occur. One change which EPA proposed will allow auto manufacturers to meet diesel exhaust emissions standards by using sales-weighted averages of the results from different model lines. Thus a manufacturer need not bring all models exactly to the standard, but could sell some models that emitted slightly more and others slightly less.

The environmental consequences of this reform are negligible, since the average vehicle will meet the standard and total emissions will be the same. But the added flexibility will save the manufacturers and consumers millions of dollars and provide car buyers with a wider range of models to choose from.

In the same vein and contrary to some allegations, DOT's proposal for a one-year delay in the passive restraint standard will not compromise traffic safety. This standard would have required the installation of passive restraints (such as airbags or automatic seat belts) in large cars by September 1981, in medium-size cars by September 1982, and small cars by September 1983. Only large cars would be affected by the delay; large cars are by far the safest of the three sizes and, "due" to rising gas prices, account for only a small fraction of new car sales. Moreover, most manufacturers would comply with the standard by using automatic seat belts rather than air bags. Since the automatic belts must be detachable, for safety reasons, many car buyers who find them uncomfortable will disconnect them and there may be little increase in seat belt usage.

Finally, the automatic seat belts are no more safe -- indeed there is some contention that they provide less safety than regular belts and cost $50 to $100 more per car. Thus by requiring passive restraints this rule will make the motorists who already choose to buckle up worse off, since they will have to pay for equipment they do not need. Personally, I find it very difficult to sympathize with those "consumer advocates" who vehemently support an action that would penalize consumers who demonstrate a concern for their safety in order to try to protect those who do not care. Clearly, a year delay is warranted to review this rule.

The Gains From Regulatory Relief

Over a number of years, we expect that regulatory relief will be a fundamental tonic for the economy. Some of the gains will be obvious and easily measured, such as the reductions in the budgets of federal agencies. The Administration has proposed to reduce expenditures on regulatory activities by the federal government by $114 million in fiscal 1981 and by $395 million in fiscal 1982, compared to the Carter budgets. As a result of these cuts, and Congress willing,the fiscal year 1982 will witness the first year-to-year decline (after adjusting for inflation) in many years in spending for federal regulatory activities (see Table 1).

Table 1

Federal Outlays for Regulatory Activities, 1970-1982

Fiscal Year	Current Dollars	Constant Dollars
	(billions of dollars)	
1970	$0.9	$0.9
1971	1.2	1.2
1972	2.0	1.8
1973	2.3	2.0
1974	2.8	2.2
1975	3.3	2.3
1976	3.6	2.5
1977	4.1	2.6
1978	4.9	3.0
1979	5.5	3.1
1980	6.5	3.3
1981 estimate	7.1	3.4
1982 estimate	7.4	3.3

Source: Based on a study of U. S. Government budgets by the Center for the Study of American Business, Washington University in St. Louis.

More important, regulatory relief will also produce substantial and measurable reductions in the costs of producing goods and services -- the $10 billion reduction in the cost of automobile regulation providing a current case in point.

But, especially over time, the most important gains from the regulatory relief program will probably be more subtle and less obvious. While another Administration might have continued the further expansion of federal regulation into new areas, this Administration will achieve significant savings by simply being more skeptical about the desirability of launching costly new regulatory initiatives. Rather than blithely assuming that every problem has a federal answer, we will be proceeding from the opposite presumption -- that individual decision-making in the private sector more often than not is the most effective response. The result will be a basic improvement in the climate in which innovation and risk bearing take place, which will translate into a more productive economy and a higher standard of living.

We will not discard regulation which thoughtfully serves the public interest. But resort to regulation should always be the last step in dealing with a problem, not the first or second. Further, before regulating, we should be certain that the world will be in better shape with that regulation than without it. Any time the government resorts to regulation, we run the risk that the market system (which works so well in most regards) will suffer unintended, incremental damage as a side-effect. The presumption should be in favor of private decision-making. If we can not demonstrate that regulation will lead to a superior outcome than the present state of affairs, we should refrain from loading yet another requirement or prohibition onto the American economic system.

In short, regulatory reform will be a cornerstone of our overall economic program. Together with tax cuts, budget reductions, and monetary restraint, regulatory relief will reduce inflation, enhance domestic productivity and international competitiveness, revive economic growth, and restore confidence in the future of the American economy.

On a final note, for those who measure the intrusiveness of the Federal government by activity in the Federal Register, here are some heartening statistics. Compared to January's edition, in the Federal Register for March 1981:

- The number of final rules published dropped by 47 percent.
- The number of proposed rules dropped by 54 percent.
- The number of published pages dropped by 60 percent.

APPENDIX TO A PROGRESS REPORT ON REGULATORY RELIEF

List of 105 Specific Regulatory Actions Cited in
Statement by Murray Weidenbaum, April 23, 1981

34 ACTIONS TO HELP THE AUTO INDUSTRY

(For more detailed descriptions see "Actions to Help the Auto Industry," Fact Sheet, April 6, 1981):

EPA

1. Revise the statutory HC and CO standards for heavy-duty trucks to a level that would not require catalysts.
2. Relax the 10 percent Acceptable Quality Level to 40 percent for assembly-line testing of light and heavy trucks.
3. Delay assembly-line testing for heavy-duty engines.
4. Relax the statutory NO_x emissions limits for heavy-duty engines.
5. Institute NO_x emission averaging for light and heavy trucks.
6. Institute emission averaging for diesel particulate emissions.
7. Adopt a self-certification program for vehicles to be sold at high altitude.
8. Forgo assembly-line testing at high altitudes.
9. Initiate consolidated NO_x waiver proceedings for light-duty diesel-powered vehicles.
10. Initiate consolidated CO waiver proceedings for light-duty vehicles.
11. Adopt equivalent non-methane hydrocarbon standards as an option for all vehicles.
12. Do not require use of onboard technology for the control of hydrocarbon emissions resulting from the fueling of motor vehicles.
13. Further streamline the motor vehicle certification program.

14. Relax test vehicle exemption requirements.

15. Reduce the annual number of assembly line test orders.

16. Explore deferring standards for paint shops.

17. Provide sufficient leadtime for compliance with emission regulations.

NHTSA

18. Delay implementation of first phase of "208 Standard".

19. Review requirement that manufacturers install automatic occupant restraints, e.g., air bags or automatic belt systems to protect all front seat occupants beginning in Model Year 1983.

20. Modify the existing bumper standard to meet the statutory requirements that such a standard be as cost effective as possible.

21. Rescind the "Fields of Direct View" requirements for passenger cars.

22. Terminate rulemaking on "Fields of Direct View" for trucks, buses and multipurpose passenger vehicles (MPVs).

23. Withdraw the ANPRM on post-1985 fuel economy standards.

24. Amend the regulation creating the Uniform Tire Quality Grading System.

25. Amend the regulation on Safety Belt Comfort and Convenience.

26. Terminate rulemaking on safety problems associated with Multipiece Rims.

27. Rescind the Standard on Speedometers and Odometers.

28. Propose a one-year deferral of the effective date of the Theft Protection Standard and deletion of the key removal provisions.

29. Propose modifications to the recently issued Hydraulic Brake Performance Standard for light trucks, buses and vans.

30. Propose termination of the rulemaking on Low Tire Pressure Warning Indicators.

31. Propose eliminating information requirements on Tire Reserve Load, and reducing the minimum advance notice required before tire production may start.

32. Terminate rulemaking on design testing and labelling of batteries.

33. Streamline and reduce fuel economy reporting requirements.

34. Propose changing Federal Vehicle Identification Number requirements from a Federal Motor Vehicle Safety Standard to an administrative regulation.

8 ADDITIONAL REGULATORY CHANGES

(For more details see "President Reagan's Initiatives to Reduce Regulatory Burdens," White House Fact Sheet, February 18, 1981):

Department of Education

35. Withdraw proposed bilingual education rules.

36. Propose recision of federal regulations governing school dress codes (See Department of Education Press Release).

EPA

37. Asked D.C. Court of Appeals to remand to it for reconsideration rule on garbage truck noise.

Department of Labor

38. Withdraw proposed rule requiring that chemicals in the workplace be labeled.

OMB

39. Withdraw policy memorandum establishing federal review of unnecessary hospital construction.

40. Revoke the Department of Energy's clearance for the collection of industrial energy consumption data.

Department of Energy

41. Postpone issuing final energy efficiency standards for major household appliances pending review.

42. Withdraw standby energy conservation measures.

36 REGULATIONS POSTPONED FOR FURTHER REVIEW

(For more detailed descriptions see "Statement by the Vice President Regarding Actions Taken by the President's Task Force on Regulatory Relief," press release, March 25, 1981):

Department of Agriculture

43. Revision and redesignation of section 502 Rural Housing Loan Policies, Procedures, and Authorization (46 FR 4681).

Department of Commerce

44. Federal Interaction with Voluntary Standards Bodies; Procedures (46 FR 1574).

45. The Channel Islands National Marine Sanctuary (45 FR 65198).

46. The Point Reyes-Farallon Islands National Marine Sanctuary (46 FR 7936).

Department of Education

47. Assistance to States for Education of Handicapped Children (46 FR 4912).

Department of Interior

48. Prime Farmlands (rule governing whether mined lands must be reclaimed, 46 FR 7208).

49. Prime Farmlands (grandfather clause for mining, 46 FR 7894).

50. Extraction of Coal, Two Acres or Less (46 FR 7902).

51. Tribal Government Elections (46 FR 1668, 1674).

52. FLPMA Exchange Authority for Public Land (46 FR 1634).

53. Land Withdrawal Procedures Amendments (46 FR 5794).

54. Revisions of Rules on Leases, Permits, Easements Through Public Lands (46 FR 5773).

55. Hawaiian Tree Snail (endangered species, 46 FR 3178).

56. Gypsum Wild Buckwheat and Todsens Pennyroyal (endangered species, 46 FR 5730).

57. Glacier Bay National Monument; Protection of Humpback Whale (45 FR 85741).

Department of Justice

58. The Effect of a Strike on the Admission and Continued Employment of Certain Nonimmigrants (46 FR 4856).

Department of Labor

59. Walkaround Compensation (46 FR 3582).

60. Occupational Exposure to Lead (46 FR 6134).

61. Procedures for Pre-determination of Wage Rate under Davis-Bacon (46 FR 4306).

62. Payment of Membership Fees (46 FR 3892).

63. Service Contract Act (expansion of provisions, 46 FR 4398).

64. Salary Test Levels to Determine Eligibility for Exemption from Overtime Provisions (46 FR 3010).

65. Government Contractors: Affirmative Action Requirements (46 FR 9084).

66. Labor Standards Provisions: Construction Contracts (46 FR 4380).

67. Certification Process and Adverse Effect Wage Rate (46 FR 4568).

Department of Transportation

68. Urban Transportation Planning (46 FR 5702).

69. Addition of Water to Pipelines Transporting Anhydrous Ammonia (46 FR 39).

70. Traffic Control Devices (46 FR 2038).

71. Carpool and Vanpool Projects (46 FR 2298).

72. Bus Rehabilitation Program Policy and Procedures (46 FR 9862).

73. Emergency Stockpiling of Buses (46 FR 5480).

74. Urban Initiatives Program (46 FR 5820).

Department of Treasury

75. Revenue Sharing Handicapped Discrimination Regulations (46 FR 1120).

EPA

76. Timber Products Effluent Guidelines: BPT and BCT (46 FR 8260).

77. Amendments to General Pretreatment Standards (46 FR 9404).

78. Pesticides: Classification of Uses of Active Ingredients and State Registration of Pesticide to Meet Local Needs (46 FR 2008 and 5696).

27 EXISTING REGULATIONS OR REGULATORY PROGRAMS TARGETTED FOR REVIEW

(For a more detailed description see "Statement by the Vice President Regarding Actions Taken by the President's Task Force on Regulatory Relief," press release, March 25, 1981):

Department of Agriculture

79. Mechanically processed (species) product.

80. Marketing orders for fruits and vegetables.

81. National Forest Service planning regulations.

Department of Commerce

82. Regulations implementing various fishery management plans.

Department of Education

83. Education of handicapped children regulations.

Department of Energy

84. Coal conversion program regulations.

85. Residential conservation service regulations.

EPA

86. BCT wastewater effluent guidelines.

87. Hazardous waste disposal regulations.

88. Electroplating pretreatment and general pretreatment standards.

Department of Health and Human Services

89. New drug application requirements.

90. Medicaid regulations affecting states.

91. Health care institution certifications and surveys.

Department of Housing and Urban Development

92. Minimum property standards for Federally-assisted one- and two-family dwellings and multi-family dwellings.

Department of Interior

93. Surface mining rules.

94. Federal coal management program.

Department of Justice

95. Rules implementing Executive Order 12250 to coordinate the implementation of Federal laws that prohibit discrimination.

Department of Labor

96. Occupational noise regulatory program.

97. Office of Federal Contract Compliance Policy (regulations imposing specification standards on government contractors).

98. Prevailing wage regulations for government contractors (authorized under the Davis-Bacon and Service Contract Act).

99. OSHA policies on personal protective devices.

100. OSHA carcinogen policy.

OMB

101. Urban/Community impact analyses.

102. Circular 73-7 requirements for administration of university research programs.

103. Circular 73-3 requiring universities to share in the cost of research projects.

Department of Transportation

104. Access to handicapped.

Department of Treasury

105. Use of published price indices to determine value of inventories.

WILLIAM V. ROTH, JR., DEL., CHAIRMAN
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United States Senate
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WASHINGTON, D.C. 20510

May 15, 1981

Dr. Murray L. Weidenbaum
Chairman
Council of Economic Advisors
Executive Office Building
Washington, D.C. 20506

Dr. James C. Miller, III
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Executive Office Building
Washington, D.C. 20506

Dear Dr. Weidenbaum/Mr. Miller:

Please find enclosed written questions submitted for the record by Senator Rudman and myself concerning regulatory reform. I would appreciate a written response to our questions.

Thank you for your assistance on this matter.

Sincerely,

Bill Roth

William V. Roth, Jr.
Chairman

Enclosure

WVR/jlm

WARREN B. RUDMAN
NEW HAMPSHIRE

United States Senate
WASHINGTON, D.C. 20510

Regulatory Reform
Additional Written Questions

Submitted By Senator Warren Rudman

Murray L. Weidenbaum
James C. Miller III

Mr. Weidenbaum, in the March/April 1981 issue of "Regulation" magazine you said that there is "compelling logic" in the concept of a regulatory budget. Please explain this concept, and how it can be implemented into S. 1080.

In this same issue of "Regulation," Mr. Miller, you said that in the event that an agency wanted to eliminate a regulation, or reduce its effect, you would immediately waive it from the effects of the Executive Order on regulatory reform. Would you recommend a provision to this effect in S. 1080? Should not the benefits and costs of the elimination of a regulation be considered to the same degree as the promulgation of a regulation?

THE CHAIRMAN OF THE
COUNCIL OF ECONOMIC ADVISERS
WASHINGTON, D.C. 20506

May 22, 1981

Dear Senator Roth:

This is in response to your letter of May 15 requesting my responses to the questions submitted by Senator Warren Rudman: The concept of a regulatory budget involves setting a ceiling on the total costs that each regulatory agency can impose on an entire society, including the business sector, consumers, and State and local governments. I do not suggest that the requirement for a regulatory budget be included in S. 1080. As I stated in the March/April 1981 issue of Regulation which you refer to, a good deal of basic development has yet to be done for the regulatory budget and advances in the state of the art are needed. That will require considerable research and development prior to the development of legislative provisions.

Sincerely,

Murray L. Weidenbaum

The Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, DC 20510

Responses of Mr. Miller to Written Questions Submitted by Senator Roth

Question 1. You stated on page four of your testimony that the experience of operating under Executive Order 12291 "has been too short and insufficient to permit a definitive judgement as to precisely how it will work in the long run." Many if not most of the provisions of S. 1080, especialy those requiring a regulatory impact analysis, are similar to provisions in the Executive Order. In view of this fact, do you think it would be advisable to postpone the enactment of S. 1080 or similar regulatory reform legislation until we have had the benefit of more experience under the Executive Order?

Answer. No, I do not believe it would be advisable to postpone the enactment of S. 1080. The bill contains important procedural reforms and principles that should be enacted into law as soon as possible. However, as I stated in my testimony, I do think it is advisable to delay the effective date of the bill's regulatory impact analysis requirements so that both the agencies and the Executive Office of the President have time to hone the regulatory impact analysis process and learn from our current experiences. I, therefore, strongly support the current delayed effective date provision in S. 1980.

Question 2. On page nine of your testimony, you stated that "we must ensure that we do not create a new gauntlet of judicially reviewable procedures which could be used for purposes other than those for which regulatory reform is intended." Specifically, what sorts of "judicially reviewable procedures" would, in your opinion, harm the cause of regulatory reform? For instance, do you believe that the regulatory impact analysis, including the cost benefit and cost effectiveness tests, should be subject to judicial review?

Answer. First, I am concerned about judicial review of the determination whether a rule is or is not major, particularly the determinations under subparagraphs (ii) and (iii) of the major rule definition. The specifications in those subparagraphs are sufficiently broad that almost any rule cold argubly be considered major. The agencies would be forced into an untenable choice of either performing a full regulatory impact analysis of all rules conceivably within those definitions, or taking the risk of proceeding without the analysis. In the first case, the requirement would be unmanageable; in the second case, there would be the constant risk of judicial reversal. The solution to this, in our review, is that, if there is to be judicial review of the major rule determination, the review provision should be limited to subparagraph (i) of the definition. The definitions in subparagraphs (ii) and (iii) would remain, but the determination of whether a rule fits within the definitions would be left to the President or his designee.

There is a related question of whether the regulatory impact analysis, once completed, should be subject to judicial review and under what standard. In my view, the analysis should be made part of the whole record for review by the court, and flaws in the analysis should only constitute reversible error if they render the rule, as a whole, arbitrary and capricious.

Similarly, while I support the concept of hybrid rulemaking, I believe we have to be careful that judicial review of an agency's decison to grant or deny hybrid proceedings is limited. Otherwise, rules may be overturned for peripheral, procedural reasons. A limitation on judicial review, such as that contained in the Toxic Substances Control Act, U.S.C. § 2618 (c) (1) (B) (ii), would be appropriate.

Question 3. Do you believe that an agency's decision to treat a rule as a major rule should be subject to judicial review and if so, in what circumstances and under what legal standards?

Answer. As I indicated in response to question No. 2, I think that if there is to be judicial review of the decision to treat a rule as major, it should be limited to the $100 million test contained in subparagraph (i). The definition in subparagraph (i) should also be limited to rules that will result in increased costs. I think that that definition, as modified, would provide a "bright line" test that the courts could apply. As for the standard of review, I think, again, that the failure to treat a rule as major should only be reversible error if the failure renders the rule as a whole arbitrary and capricious.

Question 4. S. 1080 contains a provision permitting an interested party to a rulemaking to receive an extension of time for participation unless the agency finds that such extension of time is contrary to the public interest. Do you believe that this provision will result in unnecessary delay in the regulatory process and if so, how would you like to see this section amended?

Answer. In general, I think we have to approach all changes in the basic provisions of Section 553 of the Administrative Procedure Act with care. There is a danger that the provision allowing for, in effect, routine extensions of the comment period could unnecessarily delay the regulatory process, and I am not certain that this provision is needed.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

September 10, 1981

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D. C. 20510

Dear Senator Roth:

This is in response to your letter of August 12, 1981, which set forth three broad questions regarding the operation of Executive Order 12291. Senator Levin requested that you ask us to respond to these questions so that our response might be considered during the Committee's consideration of S. 1080. I apologize that we have been unable to provide this response earlier.

Attached to this letter are materials which are responsive to your request. Because essentially the same questions were asked earlier by Chairman John Dingell of the House Committee on Energy and Commerce, we are including all of the material provided to him.

Specifically, with regard to your first question, Attachment 6 to our letter to Chairman Dingell of June 26, 1981 (Attachment 1 to this letter), sets forth a list of 55 regulations with regard to which we advised the concerned agency that the regulation was inconsistent with Executive Order 12291. (Our letter to Chairman Dingell of August 28, 1981 (Attachment 2 to this letter), erroneously includes as Attachment 1, a slightly different list of these 55 regulations. This submission was the result of an administrative error in assembling the many attachments. The list which is Attachment 6 to the June 26, 1981 letter is the correct list.) We do not have a list of additional regulations in this category for the period subsequent to June 10, 1981. Furthermore, we do not keep records which enable us to know how long the agencies were working on these regulations prior to their submissions to us under the Executive Order.

With regard to your second question, we have enclosed as Attachment 3 to this letter, a copy of a memorandum signed by OMB Director David A. Stockman concerning procedures for receiving comments from the public on regulations. Because of the large amount of material that has been submitted by the public, we have placed these materials in a reading room which is available to the public. Copies may be made of these submissions. Interested parties have also been advised to send materials to the concerned agency, since, as you know, the material is most useful in formulating a rule if it is available to the agency conducting the rule making since if the rule is not adequately supported in the rule making record, the rule may be overturned upon review by the courts. We have not made copies of these public comments because of the large number of documents, but will be pleased to arrange a specific time for your review. The documents are located in Room 3036, New Executive Office Building, 17th & H Streets, N.W., Washington, D.C. 20503. We do not keep telephone or meeting logs and so we do not have a list of contacts as you requested. Our policy is to avoid problems that may result from conversations such as these by limiting their incidence (see in this regard, Attachment 5 to the June 26, 1981, letter to Chairman Dingell).

With regard to your third question, please refer to our letter of August 28, 1981, to Chairman Dingell, enclosed as Attachment 2 to this letter.

We are preparing additional material that is relevant to your questions and we will forward it within the next few days. I hope that this material is useful and that any additional questions that you or Senator Levin may have may be answered by us in meetings we are attempting to schedule with you now before the Committee's consideration of S. 1080 resumes. The Administration strongly supports legislation to reform our regulatory procedures as I hope my testimony and our efforts have made clear. As you know, the sections of S. 1080 that pertain to the process by which the Executive provides guidance to the agencies during the rule making process is of central importance to us. We appreciate your efforts, those of Senator Levin and those of your respective staffs in understanding and meeting our objectives in providing the regulatory relief and reform that is needed. We look forward to continuing to work with you.

Sincerely,

James C. Miller III
Administrator for Information
and Regulatory Affairs

Enclosures

Attachment 1

REGULATIONS RETURNED TO AGENCIES FOR RECONSIDERATION OR CHANGE FOLLOWING OMB E.O. 12291 REVIEW

Title of Regulation	Sponsoring Department or Agency	Stage of Regulation
Computer System Parameters-Definitions	Department of Commerce	Final
Merchant Marine Training-State Maritime Academies and Colleges	"	Proposed
Re-examination Proceedings	"	Final
Federal Interaction with Voluntary Standards Bodies (Part 19 of Title 15, CFR) Final	"	Final
The Channel Islands National Marine Sanctuary Regulations, 15 CFR, Part 935	"	Final
The Point Reyes-Farallon Islands National Marine Sanctuary Regulations, 15 CFR, Part 936	"	Final
Atlantic Groundfish (Cod Haddock and Yellowtail Flounder) Notice of Adjustment in Yellowtail Flounder Catch Limitations	"	Final
Clarification of the Validity Period for Emergency Licenses	"	Final

Title of Regulation	Sponsoring Department or Agency	Stage of Regulation
Atlantic Mackerel Fishery of the Northwest	Department of Commerce	Proposed
Shrimp Fishery of the Gulf of Mexico	"	Proposed
Classification of Clinical Chemistry and Clinical Toxicology Devices	Department of Health and Human Services	Proposed
Classification Ear, Nose, and Throat Devices	"	Final
Classification of Opthalmic Devices	"	Proposed
Classification of Physical Medicine Devices	"	Final
Classification of Anes-thesiology Devices	"	Final
A Request for Waiver for HUD/VA Changes in the Interest Rate Level	Department of Housing and Urban Development	Final
Part 804- Low Rent Housing Homeownership Opportunities Part 805- Indian Housing and Part 841, Public Housing Development Phase	"	Final

Title of Regulation	Sponsoring Department or Agency	Stage of Regulation
Assurance of Completion Requirements;Multifamily Projects Covered by HUD Mortgage Insurance	Department of Housing and Urban Development	Final
Part 570- Subpart F, Small Cities Program, Commonwealth of Puerto Rico	"	Final
Part 146- Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance From HUD	"	Final
Part 882, Section 8 HAPP-Existing Housing, Section 882.215 Eviction	"	Final
Part 886- Low-Income Public Housing-Lease and Grievance Procedures	"	Final
Part 51- Environmental Criteria and Standards-Projects In Designated Clear Zones	"	Final
Part 885- Section 202, Loans for Housing for the Elderly or Handicapped	"	Final
Part 200- Subpart S-Introduction, Minimum Property Standards, Proposed Revision of Use of Materials Bulletin NO.78A for PE, ABS, Vinyl Chloride	"	Final

Title of Regulation	Sponsoring Department or Agency	Stage of Regulation
Part 430, Subpart F- Mortgagor and Tenant Relationship, Mortgagor Relationship to Tenant Activities- Proposed Rule	Department of Housing and Urban Developement	Final
Part 242- Mortgage Insurance for Hospitals, Subpart A Eligibility Requirements	"	Final
Part 865- PHA- Owned Project Management, Subpart E- Consolidated Supply Project	"	Final
Part 570, CDBG, Applications for Discretionary Awards for Technical Assistance	"	Final
Part 200- Change in Provisions and Characteristics of Debentures, Book Entry	"	Final
Part 51- Environmental Criteria and Standards, Projects Near Hazardous Operations	"	Final
Part 16- Privacy Acts of 1974	"	Final
Part 220, 221, and 236- Prepayment of Mortgages	"	Final

Title of Regulation	Sponsoring Department or Agency	Stage or Reglation
Part 204, Coinsurance, Subpart A, Eligibility Requirements, Subpart B-Contract Rights and Obligations	Department of Housing and Urban Development	Final
Part 200- Proposed Use of Materials Bulletin No. 70A, Particleboard Interior Stain Treads and Certification Program	"	Final
Part 570, CDBG, Subpart D-Entitlement Grants (Amends 570.302 (D) (5))	"	Final
Part 200- Subpart S- Change to HUD 4900.1, MPS for One and Two-Family Dwellings	"	Final
Part 200- Use of Materials Bulletin No. 79, Acrylonitrile-Butadiene	"	Final
Part 570- Grant Administration Requirement for Use of Escrow Accounts for Property Rehabilitation Loans and Grants in CDBG	"	Final
Part 200, Introduction- Subpart S- Minimum Property Standards-Proposed Addition of Water Conservation Requirements to HUD	"	Final

Title of Regulation	Sponsoring Department or Agency	Stage of Regulation
Part 570, CDBG, Community Development Disaster Assistance Programs (Revises 570.407)	Department of Housing and Urban Development	Final
Part 144- Nondiscrimination in Programs and Activities Receiving Assistance Under Title I of the HCDA of 1974	"	Final
Part 888- Fair Market Rents for New Construction and Substantial Rehabilitation, Section 8 Projects Battle Creek, MI	"	Final
Notice of Suspension of Certain Rules (prime farm land and acreage limitations)	Department of the Interior	Final
Proposed Revisions of Regulations Pertaining to Nonimmigration-F-1-Students and Schools Approved for their Attendance	Department of Justice	Proposed
Formula Grants for Juvenile Justice	"	Proposed
22 CFR Part 41-Nonimmigration visas-Crew-List Visas	Department of State	Final
State Registration of Pesticides to Meet Special Local Needs	Environmental Protection Agency	Final

Title of Regulation	Sponsoring Department or Agency	Stage of Regulation
Amendment to General Pretreatment Regulations	Environmental Protection Agency	Final
Ohio Sulfur Control Strategy	"	Final
40 CFR Part 86- Amended Procedures for Compliance with High Altitude Emission Standards for 82 and 83 MY Light Duty Vehicles- FRM	"	Final
Standard and Optional Forms	General Services Administration	Proposed
Availability of Agency Records to Members of the Public	National Aeronautics and Space Administration	Final
ICMP Policy and Guidelines	United States Metric Board	Final
9 Digit Zip Code	United States Postal Service	Final

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

August 28, 1981

Honorable John D. Dingell
Chairman
Subcommittee on Oversight & Investigations
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

Your letter of July 22, 1981, requests "a statement indicating which Federal statutes you believe specifically require or authorize the application of cost-benefit analysis, those which specifically preclude the application of cost-benefit analysis and those which implicitly allow the application of cost-benefit analysis as a factor in the regulatory decision-making process". Although this matter was discussed during my appearance before your Subcommittee on June 18, 1981, I appreciate the opportunity to present a more detailed explanation of the design of the Executive Order in this regard.

Executive Order No. 12291, like most other Executive Orders, imposes responsibilities upon the departments and agencies of the Executive branch. In this instance, the subject is Federal regulation, and the President has asked the departments and agencies to which the Order applies to follow certain standards and to comply with specified procedures in issuing new regulations and reviewing old ones. As I hope my testimony made clear, these directives are to be followed by the departments and agencies to the extent they are permitted by law to follow them. (The Executive Order itself includes language to that effect.) Rather than review each of the thousands of statutory provisions which might conceivably bear upon the issue of when, how and to what extent the Executive Order's requirements could apply to each particular rulemaking conducted by each department and agency, the President instead asked the departments and agencies subject to the Order to make those determinations themselves, and to comply with the requirements of the Executive Order to the extent they are permitted by law to do so. Over time, of course, we will develop a "library" of the statutes which permit agencies to accomplish what the Executive Order asks, simply by observing what the agencies submit to us and what actions they eventually take.

We believe that this is the best and most efficient way to proceed, and one that does not undercut our program nor impose undue demands upon the departments and agencies. After all, the agencies are initially in the best position to compare the requirements of the Executive Order with their own peculiar statutory requirements; to the extent that the requirements conflict, the latter, of course, will override the former.

This approach has frequently been used in our OMB Circular process, and is often successfully used in other Executive Orders. In fact, the prior two Executive Orders on the subject of government regulation--Executive Order No. 11821 entitled "Inflation Impact Statement" issued by President Ford on November 27, 1974, and Executive Order No. 12044 entitled "Improving Federal Regulation" issued by President Carter on March 23, 1978--both used the same approach as the current Executive Order No. 12291, i.e., requiring the agencies to identify the regulations subject to the various requirements of those Orders and making the initial judgment concerning whether they were permitted by law to follow those requirements.

This approach is often used in statutes, as well. The Regulatory Flexibility Act (Pub. L. 96-354) and the Paperwork Reduction Act of 1980 (Pub. L. 96-511) are but two recent examples.

In other words, we chose a method of operating for Executive Order No. 12291 which obviated the need for a compilation of statutes and an analysis and categorization as you have requested, and that is why we are unable to furnish you with such a list.

I have asked my staff to provide some examples, however, of the types of statutes and related rulemakings that would fall within the various categories. It should be noted that although the three categories cited in your letter are useful for analytical purposes, they do not completely reflect the complexity of some issues that can arise under the Executive Order.

With regard to the first category--"a statement indicating which Federal statutes you believe specifically require or authorize the application of cost-benefit analysis"--the Attachments to my letter to you of June 26, 1981, and several of the items made a part of the record during my testimony on June 18, 1981, list the regulations which the agencies have determined are subject to Executive Order No. 12291. No agency has advised us in connection with these regulations that the requirements of the Executive Order are precluded by the statute authorizing the rulemaking or governing its procedures. Although there may be some statutory provisions which do limit or condition in some regard the application of the Executive Order's requirements, this listing of rules and statutes is the most complete listing of the statutes within this category. The best "statement" appears in the Department of Justice Opinion of February 13 concerning Executive Order No. 12291, which was included as Attachment 18 to my letter to you of June 26, 1981.

This same list and this same "statement" applies to the third category--"those [Federal statutes] which implictly allow the application of cost-benefit analysis as a factor in the regulatory decisionmaking process". Although some of the statutes may limit or condition how benefit-cost considerations may be used in a regulatory decisionmaking process, the agencies have not advised us of any statutory limitations with regard to the identified regulations. If there were any limits that the agencies believed applied to the application of the requirements of the Executive Order, they would have limited the application of the Order's requirements in that regard.

The final category, which was the second category in your request, is for "those [Federal statutes] which specifically preclude the application of cost-benefit analysis". There are examples of statutes which do not require the application of certain types of economic tests pursuant to particular, statutorily defined agency rulemaking decisions. Agency rules pursuant to these statutory provisions which did not include certain economic tests have been judicially sustained against challenges to those rules based on agency failure to use those economic tests. Examples of these types of statutes and rules are discussed in EPA v. National Crushed Stone Association, ___ U.S. ___, 66 L.Ed. 2d 268, 101 S. Ct ___, (which sustained an EPA rule which did not provide for the consideration of certain economic factors in permitting variances from the 1977 effluent limitations for categories of point sources pursuant to section 301 of the Federal Water Pollution Control Act of 1972, 33 U.S.C. 1251 et seq.); and in American Textile Manufacturers Institute v. Donovan, ___ U.S. ___, 69 L. Ed. 2d 185, 101 S. Ct. ___, (which sustained a Department of Labor regulation issued pursuant to section 6 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 655, establishing a mandatory nationwide standard limiting occupational exposure to cotton dust which was challenged on the grounds that DOL had not demonstrated a reasonable relationship between the costs and benefits associated with the standard).

The Executive Order requires agencies to prepare a Regulatory Impact Analysis, including an analysis of benefits and costs, for all major regulatory actions. It does not require, however, that the agency action be guided by the results of that analysis in all cases or even that the analysis always be considered in formulating the final agency rule. Instead, the Order clearly states that the agencies shall consider the results of the analysis "to the extent permitted by law". Executive Order No. 12291, Section 3(a). I say this in conclusion to our response to your question because I want to emphasize again that, in providing examples of the range of statutory treatments of benefit-cost analysis, we do not intend to preempt or prejudge the relevant agency's interpretation of its statutory mandate.

In further response to your letter, enclosed are:

1. A list of the 55 regulations which were the subject of a request for agency reconsideration;
2. A list of the 25 regulations that were withdrawn by the agencies;
3. A list of the 35 regulations for which additional time was required for review or consultation;
4. A list of major rules designated by OMB pursuant to section 6(a)(1) of Executive Order No. 12291;
5. A copy of "Interim Regulatory Impact Analysis Guidance" issued pursuant to section 6(a)(2) of Executive Order No. 12291, a copy of which was included in Attachment 16 of my June 26, 1981, letter to you (beginning on page 31);
6. A list of a case in which OMB acted pursuant to section 6(a)(3) of Executive Order No. 12291;
7. A list of rules for which OMB has exercised the authority to waive requirements pursuant to section 6(a)(4) of Executive Order No. 12291;
8. A list of additional existing regulations designated for review (since June 13, 1981); and
9. A list of Regulatory Impact Analyses which were returned to the preparing agency.

We have not included with this letter all of the information which you requested since we are still in the process of compiling and reviewing some of it. We hope to be able to respond to you soon regarding this additional material.

Sincerely yours,

James C. Miller III
Administrator for Information
and Regulatory Affairs

Enclosures

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

June 11, 1981

EMBARGOED FOR RELEASE:
6:00 p.m. E.D.T.
June 13, 1981

M-81-9

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: DAVID A. STOCKMAN
DIRECTOR

SUBJECT: Certain Communications Pursuant to
Executive Order 12291, "Federal Regulation"

Regulatory relief is one of the cornerstones of President Reagan's program of economic recovery. As an important step in achieving regulatory relief, on February 17, 1981, the President issued Executive Order 12291, "Federal Regulation." This memorandum explains how the Presidential Task Force on Regulatory Relief and the Office of Management and Budget (OMB) will communicate with the public and the agencies regarding proposed regulations covered by E.O. 12291. It also describes certain obligations of the public and agencies in this regard.

A major purpose of the Executive Order is to ensure that, to the extent permitted by law, regulatory decisions are based upon sound analysis of the potential consequences. Toward this end, a comprehensive factual basis is essential to assist agencies and other interested parties in assessing the economic and other ramifications of proposed regulations.

Under the Executive Order, both the Task Force and OMB will be reviewing factual materials related to regulatory proposals. Both the public and the agencies should understand that the primary forum for receiving factual communications regarding proposed rules is the agency issuing the proposal, not the Task Force or OMB. Factual materials that are sent to the Task Force or OMB regarding proposed regulations should indicate that they have also been sent to the relevant agency. Pursuant to this policy, the Task Force and OMB will regularly advise those members of the public with whom they communicate that relevant factual materials submitted to them should also be sent to the agency for inclusion in the rulemaking record. Accordingly, agencies receiving such materials from the public should take care to see that they are placed in the record.

On occasion, the Task Force staff and OMB will receive or develop factual material which they believe should be considered by an agency during a particular informal rulemaking. In accordance with advice provided by the Department of Justice, such material, when submitted to an agency for its consideration, will be identified as material appropriate for the whole record of the agency rulemaking.

Two additional matters should be noted. First, our procedures will be consistent with the holding of and policies discussed in Sierra Club v. Costle, No. 79-1565, slip op. at 212-20 (D.C. Cir. April 29, 1981). Second, these procedures apply only to informal rulemaking proceedings and are not in any sense intended to affect the more stringent ex parte rules applicable to agency adjudications and formal rulemakings. (Such proceedings are expressly intended by Congress to be more in the nature of formal judicial proceedings and involve bars against various forms of ex parte communication.)

United States Department of Justice

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

WASHINGTON, D.C. 20530

SEP 1 5 1981

Honorable William V. Roth, Jr.
United States Senate
Washington, D. C. 20510

Dear Senator Roth:

This responds to your letter of July 29, 1981 to the Attorney General requesting this Department to explain the apparent difference between legal advice rendered on January 17, 1979 by the Office of Legal Counsel on the subject of *ex parte* contacts and what you describe as an "undated Justice Department memo (about June, 1981) from the same office to OMB Director, David Stockman, on the same subject." In order to facilitate your understanding of the balance of this letter, we have attached for your convenience copies of the two opinions of the Office of Legal Counsel which we assume to be pertinent to your inquiry. The January 17, 1979 opinion is addressed to former Secretary of the Interior Andrus; the other is an opinion to Director Stockman of April 23, 1981, which is the only opinion issued by the Office of Legal Counsel during this Administration addressed to Mr. Stockman on this subject.

As we understand the question asked of this Department, the apparent difference between the two memoranda rests on the assumption that the January 17, 1979 memorandum "seems to require a logging by the Council of Economic Advisors of all non-government contacts with the CEA regarding agency rulemakings . . . ." That is not an accurate characterization of the January 17, 1979 opinion, however. Specifically, as stated at the outset of that memorandum, the Office of Legal Counsel had been requested as follows:

> "to work with the interested persons to develop and implement whatever procedures are necessary to assure compliance with the requirements imposed by recent decisions of the United States Court of Appeals for the District of Columbia Circuit."

January 17, 1979 memorandum, at p. 2. Later on that same page, the memorandum concluded "that by adhering to the several procedural steps, . . . there has been proper compliance with the law as it has developed in the D.C. circuit."

As these two quotations make clear, the task undertaken by the Office of Legal Counsel in the counselling that preceded issuance of its January 17, 1979 opinion was to construct a procedure which would ensure that the so-called strip-mining rule would not be set aside in the judicial review of that rule, which was expected to occur in the D.C. Circuit. That opinion did not conclude that those procedures were legally required as a matter of interpreting the applicable statutes.

The Office of Legal Counsel did not at that time regard the law fashioned by the D.C. Circuit on the subject of "ex parte" communications in the informal rulemaking as being necessarily correct. For example, on page 7 of the January 17 memorandum the statement was made that the "Supreme Court's decision in Vermont Yankee, as well as decisions by other panels of the D.C. Circuit, cast considerable doubt on the correctness and applicability of these court-fashioned 'ex parte' rules to the present circumstances . . . ." (footnote omitted). This basis for why the Office of Legal Counsel recommended rather than "required," implementation of the procedures discussed in the January 17, 1979 memorandum was articulated quite clearly in a letter from the Assistant Attorney General in charge of that Office to the Chairman of the Senate Committee on Energy and Natural Resources on January 25, 1979. We have attached a copy of that letter for you.

Rather than being inconsistent, the January 17, 1979 and April 24, 1981 memoranda take precisely the same approach on this issue. The April 24 memorandum likewise questions the validity of general aspects of the D.C. Circuit's early "ex parte" cases, but goes on to make certain recommendations to Director Stockman "as a matter of protection against reversal in the D.C. Circuit . . . ." Memoranda at 3-4, 5.

Although we assume the foregoing discussion is a full response to your question, we would add that the decision of the D.C. Circuit in Sierra Club v. Costle, No. 79-1565, decided on April 29, 1981, is strongly supportive of the doubts expressed in the Office of Legal Counsel's memoranda of January 17, 1979 and April 24, 1981 regarding the correctness of the prior D.C. Circuit opinions dealing with "ex parte" contacts, particularly as applied to informal rulemaking conducted pursuant to 5 U.S.C. § 553. See generally slip op. at 194-224. That opinion squarely supports the position taken by the Office of Legal Counsel in its January 17, 1979 memorandum regarding the appropriateness of Presidential supervision of the rulemaking process as now implemented in Executive Order 12291.

We very much appreciate your interest in this subject and trust that this response will permit the record to be cleared regarding what I believe you will agree to be the consistent position of this Department on this general subject over the years.

Sincerely,

(Signed) Robert A. McConnell

Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

Attachment

24 APR 1981

Memorandum for Honorable David Stockman
Director, Office of Management and Budget

Re: Contacts Between OMB and Executive Branch Agencies
Pursuant to Executive Order 12291

Your Office has requested the views of this Office regarding the legality of contacts which may occur between you and your staff and officials of Executive agencies in the implementation of Executive Order 12291 (Order). The Order generally requires these agencies to maximize the benefits and minimize the costs of regulations promulgated following informal rulemaking proceedings. Your Office is charged with ensuring compliance with these requirements by engaging in prepublication review of proposed and final rules and preliminary and final Regulatory Impact Analyses (RIA). In performing this oversight role, you and your staff will presumably communicate on a regular basis with agency officials regarding the substance of proposed regulations. You might also wish to transmit to these agencies information or arguments received from other federal agencies or from non-federal parties. Some or all of these contacts might be challenged under the so-called "*ex parte* contacts" doctrine developed in the D.C. Circuit. 1/

1/ *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221 (D.C. Cir. 1959); *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9 (*per curiam*)(D.C Cir.), *cert. denied*, 434 U.S. 829 (1977); *Action for Children's Television* v. *FCC*, 564 F.2d 458 (D.C. Cir. 1977); *United States Lines, Inc.* v. *FMC*, 584 F.2d 519 (D.C. Cir. 1978); *Hercules, Inc.* v. *EPA*, 598 F.2d 91 (D.C. Cir. 1978); *National Small Shipments Traffic Conference, Inc.* v. *ICC*, 590 F.2d 345 (D.C. Cir. 1978); *United Steelworkers of America* v. *Marshall*, No. 79-1048 (D.C. Cir.), *stayed in part*, 101 S.Ct. 603 (1980).

While other circuits have not taken a clear position on *ex parte* contacts, the D.C. Circuit cases are particularly significant because so many federal regulatory actions are reviewed there and because, as a practical matter, the D.C. Circuit is often the court of last resort in light of the Supreme Court's limited docket.

We conclude that neither the ex parte contacts doctrine nor other generally applicable provisions of law impose any duties on you or your staff to refrain from communicating with rulemaking agencies. The law is uncertain as to whether rulemaking agencies must disclose communications from your Office which occur after publication of a notice of proposed rulemaking. In order to reduce the danger of reversal, we believe that rulemaking agencies should include in the administrative file and the record for judicial review: (1) oral or written information from your Office of a purely factual nature; and (2) oral or written material received from an interested party outside the Federal Government which influences the views your Office expresses to the agency. Your Office could assist rulemaking agencies in complying with these recommendations by following procedures similar to those described herein.

I. Ex Parte Contacts Doctrine

The D.C. Circuit has thrice addressed the question of ex parte contacts in informal rulemaking. In Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.)(per curiam), cert. denied, 434 U.S. 829 (1977), interested private parties engaged in wide-spread off-the-record communications with FCC Commissioners and staff regarding a proposed cable television rule. The court condemned the comments on several grounds, including the Due Process Clause, the judicial review requirements of the Administrative Procedure Act (APA), and what the court perceived to be a general need to ensure rationality and fairness in agency decision processes. In a broadly worded dictum, the court stated that such communications would be improper even if the FCC disclosed them in the administrative file in time to allow public comment and judicial review. The court also said that such comments would be permissible prior to publication of a notice of proposed rulemaking. 2/

In Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977), a different panel of the D.C. Circuit refused to apply Home Box Office retroactively. In dictum, the panel severely criticized the Home Box Office rationale and expressed its view that the doctrine should be limited to a narrow class of cases involving competing private claims to a valuable privilege. Id. at 477.

In United Steelworkers of America v. Marshall, No. 79-1048 (D.C. Cir.), stayed in part, 101 S.Ct. 603 (1980), the D.C. Circuit limited the ex parte contacts doctrine in the context of intra-agency communications. While formulating a final

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2/ Home Box Office, Inc. v. FCC, 567 F.2d 9, 59 (per curiam)(D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

rule regulating workplace exposure to airborne lead, the Assistant Secretary of Labor consulted closely with a staff attorney who argued for the agency staff's proposed standard. The Assistant Secretary also commissioned private consultants to review and analyze the record, and partly relied on these studies in formulating a final rule. The court, per Chief Judge Wright, held that these off-the-record intra-agency communications were permissible, even if slanted towards a particular viewpoint, 3/ if they were part of the "deliberative process," a concept closely analogous to the deliberative process exemption under the Freedom of Information Act (FOIA). 4/

The doctrine developed in Home Box Office involves three distinct requirements: (1) a flat prohibition on agency receipt of views and information outside the usual channels for public comment; (2) a requirement that such views and information, if received, be memorialized and placed in the administrative file for public comment; and (3) a duty to place such views and information in the record for judicial review. In Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978), the Supreme Court severely undermined the Home Box Office doctrine. It held that, absent exceptional circumstances, a reviewing court may not impose special rulemaking procedures beyond those set forth in the APA.

We believe that Vermont Yankee is inconsistent with D.C. Circuit's flat ban on agency receipt of views or information outside the usual channels for public comment. This purely procedural prohibition finds no support whatever in the text or the legislative history of the APA. The APA contains no prohibition on such contacts in informal rulemaking, although it has always prohibited them in adjudication, 5/ and a recent amendment provides penalties and remedies when they occur in adjudication or formal rulemaking. 6/ Early versions of that amendment prohibited such contacts in informal rulemaking as well, 7/ but the provision was deleted with the intention of

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3/ Compare Association of National Advertisers, Inc. v. FTC, 627 F.2d 1151 (D.C. Cir. 1979)(disqualification for bias).

4/ 5 U.S.C. § 522(b)(5)(1976).

5/ Id. § 554(d).

6/ Government in the Sunshine Act, 5 U.S.C. § 557(d)(1976).

7/ See S. 260 93d Cong., 1st Sess. 1202, 119 Cong. Rec. 647-51 (1973); H.R. 1000, 93d Cong., 1st Sess. § 5(a), 119 Cong. Rec. 118, 169-70 (1973); Hearings on Government in the Sunshine Before the Subcomm. on Reorganization, Reserch, and International Organizations of the Senate Comm. on Government Operations, 93d Cong. 2d Sess. 189-254 (1974); Senate Committee on Government Operations, 93d Cong., 1st Sess., Government in the Sunshine: Response to Subcomm. Questionnaire (Comm. Print. 1973).

leaving informal rulemaking unaffected. 8/ We believe this history to be strong evidence that there is no basis for imposition by a court of a flat prohibition on agency receipt of views or information outside the ordinary channels. You and your staff may freely contact agencies regarding the substance of proposed regulations, and may do so by way of telephone calls, meetings, or other forms of communication unavailable to members of the public.

It is unclear whether the two other requirements of Home Box Office -- that the substance of contacts be placed in the administrative file and the record for judicial review -- can survive Vermont Yankee. These requirements might possibly be supportable, not as part of an "ex parte contacts" doctrine, but as implications of the APA's provisions for judicial review and for public participation in informal rulemaking, a question we discuss in the following section. What is clear, however, is that the disclosure obligations, if any, lie with the rulemaking agency and not with your Office. Your Office is therefore under no legal disability with respect to contacts with rulemaking agencies. At most, your Office could adopt procedures as a matter of policy to assist the agencies in complying with our recommendations or with rules fashioned by the agencies themselves to address this issue. 9/

8/ S. Rep. No. 354, 94th Cong., 1st Sess. 35 (1975); 121 Cong. Rec. 35,330 (1975)(remarks of Sen. Kennedy).

9/ Specific "hybrid rulemaking" statutes may sometimes impose special rules regarding contacts between your Office and rulemaking agencies. The Clean Air Act Amendments of 1977, for example, require that written documents compiled during your Office's review procedures be placed in the rulemaking docket prior to the promulgation of a final rule. 42 U.S.C. § 7607(d)(4)(B)(ii)(Supp. III 1979). These documents are excluded from the record on judicial review. Id. § 7607(d)(4)(B)(ii). Two challenges to inter-agency participation in Clean Air Act rulemaking are now pending in the D.C. Circuit. Sierra Club v. Costle, Nos. 79-1565 et al; American Petroleum Institute v. Costle, Nos. 79-1104 et al. In those cases EPA officials met with other Executive Branch officials to discuss a rule after the close of the public comment period; the substance of these meetings was not fully disclosed in the record for judicial review. The government takes the position that EPA fully complied with the Clean Air Act's requirements. The cases have been argued and await decision.

Internal agency regulations, which have the force of law until repealed, may also limit contacts with your Office during rulemaking. Cf. 47 C.F.R. § 1 (1979)(FCC); 16 CFR § 1012 (1979)(CPSC); 14 CFR § 300.2 (CAB).

II. Disclosure Obligations of Rulemaking Agencies

We believe that, at least as a matter of protection against reversal in the D.C. Circuit, rulemaking agencies should disclose in the administrative file and the record for judicial review substantive communications from your Office to the extent that they are (1) purely factual as opposed to deliberative in nature, or (2) received by your Office from a source outside of Executive or independent agencies. This conclusion is based on a combination of possible disclosure requirements in the APA and a deliberative process exception.

A. APA Provisions

The APA provides that judicial review of informal rulemaking shall be based on the "whole record." 5 U.S.C. § 706. The Supreme Court has never clearly stated what types of material must be included in the record for judicial review. Traditionally, informal rulemaking procedures were thought to leave the agency almost complete discretion as to what was included in the record; judicial review was correspondingly narrow and deferential. More recently, the Supreme Court has stated that judicial review of informal agency action should be "searching and careful," 10/ and that a reviewing court should remand a case to the agency if its determination is not "sustainable on the administrative record made." 11/ The relatively intensive judicial scrutiny implied by these statements seems incompatible with the traditional idea that the agency retains complete control over what goes in the record. Lower federal courts have expanded on the Supreme Court's tentative statements by inferring a requirement that the record for judicial review contain all material, whether factual, analytical, or argumentative, which is substantive in the sense that it might have influenced the agency's decision. 12/ Finally, the Supreme Court in *Vermont Yankee* gave somewhat conflicting signals on the question. 13/

10/ *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971).

11/ *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973)(*per curiam*).

12/ *See* *National Courier Ass'n* v. *Board of Governors*, 516 F.2d 1229, 1241 (D.C. Cir. 1975). *See generally* *Portland Cement Ass'n* v. *Ruckleshaus*, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *Kennecott Copper Corp.* v. *EPA*, 462 F.2d 846 (D.C. Cir. 1972); *International Harvester Co.* v. *Ruckleshaus*, 478 F.2d 615 (D.C. Cir. 1973). *Cf.* *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 941 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

13/ *Compare* Stewart, *Vermont Yankee* and The Evolution of Administrative Procedure, 91 Harv. L. Rev. 1805 (1978), *with* Byse, *Vermont Yankee* and the Evolution of Administrative Procedure: A Somewhat Different View, 91 Harv. L. Rev. 1823 (1978).

The Court's emphasis on the agency's discretion to structure its own procedures free of judicial interference suggests that this discretion should include the power to determine the content of the record for judicial review. On the other hand, the Court's remand of the case to the D.C. Circuit for a determination of whether the rule was sustainable on the administrative record points to a more stringent record requirement. 14/

The state of the law on this point is, in short, confused. We do not believe it to be particularly useful to attempt to predict whether the Supreme Court would require that substantive oral or written communications received by the agency be included in the record for judicial review. We would, however, recommend that agencies generally adopt this course to avoid a substantial danger of reversal in the D.C. Circuit without any assurance of vindication in the Supreme Court. 15/

We would also recommend that agencies generally include substantive oral or written communications in the administrative file for public comment and criticism, at least when these communications occur before the close of public comment. 16/ A "public comment" requirement could be inferred from the APA's provision for review on the whole record and its guarantee of an "opportunity to participate in the rule making," 5 U.S.C. § 553(c). On the other hand, such a requirement comes perilously close to the type of extra-statutory procedure Vermont Yankee forbids courts to require of agencies. In addition, the opportunity to comment on evidence in the record seems inconsistent with the realities of informal rulemaking, clearly sanctioned by the APA, that interested parties can file comments on the last day of the comment period and thereby deprive others outside the government of a chance to comment unless the agency, in its discretion, chooses to reopen the file. The argument for public comment is considerably weaker than the case for placing substantive material in the judicial record; our judgment

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14/ One commenter has argued that in light of the administrative record the Court should simply have affirmed the agency rather than remanding. Breyer, Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy, 91 Harv. L. Rev. 1833 (1978).

15/ The agency need not engage in unnecessary duplication of material already contained in the record, however.

16/ A case-by-case analysis may be required to determine whether the administrative file must be reopened to allow public comment on communications received after the close of the comment period. See Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.), cert denied, 426 U.S. 941 (1976).

is that the Supreme Court would not impose such a requirement. Nevertheless, the D.C. Circuit probably would require public comment, 17/ and the prospects of obtaining Supreme Court review of such a determination cannot be predicted.

B. Deliberative Process Exception

Notwithstanding these general recommendations, we believe that the rulemaking agency need not disclose substantive communications from your Office which form part of the agency's deliberative process. A variety of legal doctrines recognize a privilege against compelled disclosure of the federal government's deliberations. The need for non-disclosure is inherent in the President's constitutional power to "take Care that the Laws be faithfully executed," 18/ by "supervis[ing] the guid[ing]" Executive Branch agencies in their "construction of the statutes under which they act in order to secure the unitary and uniform execution of the laws which Art. II of the Constitution evidently contemplated in vesting executive power in the President alone." 19/ Similar concerns undergird the constitutionally based privilege for certain deliberative communications within the Executive Branch, 20/ as well as the rule against probing an administrator's mind in court absent a showing of bad faith or other exceptional circumstances. 21/ Congress has safeguarded the deliberative process by exempting deliberative documents from disclosure under the FOIA. 22/ Finally, the D.C. Circuit held the *ex parte* contacts doctrine inapplicable

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17/ *See* *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9 (D.C. Cir.)(*per curiam*), *cert. denied*, 424 U.S. 829 (1977); *Ethyl Corp.* v. *EPA*, 541 F.2d 1 (D.C. Cir.), *cert. denied*, 424 U.S. 941 (1976). Cf. *United States Lines, Inc.* v. *FMC*, 584 F.2d 519 (D.C. Cir. 1978)(informal adjudication).

18/ U.S. Const., Art. II, § 3. *See also* U.S. Const., Art. II, § 2 (presidential power to require written opinions from heads of Executive Departments).

19/ *Myers* v. *United States*, 272 U.S. 52, 135 (1926).

20/ *See* *United States* v. *Nixon*, 418 U.S. 683 (1974).

21/ *See, e.g.*, *United States* v. *Morgan*, 313 U.S. 409, 422 (1941); *National Courier Ass'n* v. *Board of Governors*, 516 F.2d 1229, 1241-42 (D.C. Cir. 1975).

22/ 5 U.S.C. § 552(b)(5); *see generally* *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1974).

to deliberative process communications in *United Steelworkers*, *supra*. For similar reasons, we believe that oral or written communications which are part of the deliberative process need not be disclosed under any provisions of the APA.

Deliberative process communications are those designed to aid the agency in determining its course based on the facts of record. They include analyses of these facts, 23/ legal and policy arguments, 24/ and factual data that cannot be reasonably segregated from deliberative material. 25/ They do not include oral or written factual data which can be reasonably segregated from deliberative material. 26/ Thus the rulemaking agency need not disclose your Office's legal and policy arguments and analyses of the facts, but should generally disclose readily segregable factual material.

Communications from Executive or independent agencies are entitled to deliberative process protection. Your Office surely participates in the deliberative process when it exercises the power of the President delegated to you to "supervise and guide" the agency by communicating factual analyses or legal and policy arguments. We believe the deliberative process is also implicated when your Office acts as a "conduit" for views of other Executive agencies, since these agencies are part of an integrated Executive Branch headed by the President. We reach the same conclusion with respect to independent agencies. 27/ Although largely freed of presidential oversight and supervision, these agencies are part of a unitary government

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23/ *See* *United States Steelworkers of America* v. *Marshall*, No. 79-1048, slip op. at 26, 38 (D.C. Cir.), *stayed in part*, 101 S.Ct. 603 (1980).

24/ *See*, *e.g.*, NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1974)(exemption 5 protects attorney-client and attorney work-product privileges); *EPA* v. *Mink*, 410 U.S. 73, 91 (1973)(exemption 5 protects "matters of law, policy or opinion").

25/ *See* *EPA* v. *Mink*, 410 U.S. 73, 88 (1973); *United Steelworkers of America* v. *Marshall*, No. 77-1048, slip op. at 44 (D.C. Cir.), *stayed in part*, 101 S.Ct. 603 (1980); *Mead Data Central, Inc. v. United States Department of Air Force*, 566 F.2d 242, 260-61 (D.C. Cir. 1977).

26/ *See* cases cited in note 25, *supra*. Also not within the deliberative process are communications which the agency adopts as the explanation for its action. *See* *Rengotiation Board* v. *Grumman Aircraft Engineering Corp.* 421 U.S. 168 (1975); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

27/ Deliberative process documents transmitted from an independent agency to an Executive Branch agency would be exempt from disclosure under FOIA. 5 U.S.C. §§ 552(b)(5), 552(e).

which seeks as far as possible to coordinate its programs and policies. 28/

Our view is that the deliberative process does not extend to the legal or policy views of persons outside of Executive or independent agencies. These persons are not within the overall decision process of the rulemaking agency. Their views not being protected by a deliberative process exception, the rulemaking agency would be well advised to place these views in the administrative file and the record for judicial review if the views might affect the agency's decision. Agencies should follow this procedure even if the views are transmitted by an Executive or independent agency acting as a "conduit" for the third party.

III. OMB Procedures

As discussed above, your Office is under no legal obligation to limit its communications with rulemaking agencies. We also conclude that, as a matter of policy, the agencies should include in the administrative file and the record for judicial review substantive oral or written communications from your Office which (1) are purely factual in nature, or (2) are "conduit" transmissions of views or information from persons outside of Executive or independent agencies. Your Office could assist the rulemaking agencies in the task of distinguishing what should be disclosed from what may be kept out of the public record, as follows:

(1) Your Office could separate, as far as possible, purely factual material from arguments and analysis in oral or written comments it makes to the rulemaking agency under the Order. A format could be developed for comments which clearly draws this distinction. The agency should generally be entitled to rely on your Office's judgment that the transmitted material is deliberative rather than factual in nature.

(2) With respect to "conduit" communications, the official responsible for commenting to the rulemaking agency could determine whether his views have been influenced by oral or written communications received from someone outside of Executive or independent agencies. If so, your Office could require that the third party transmit this material to the rulemaking agency for inclusion in the administrative

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28/ Our conclusions in this regard are consistent with Recommendation 80-6 of the Administrative Conference of the United States regarding Executive Branch Communications in Informed Rulemaking Proceedings.

file and the record for judicial review. The official may transmit to the rulemaking agency a statement of your Office's views, which need not be disclosed except to the extent it includes purely factual material.

Alternatively, or in conjunction with these procedures, your Office could seek to ensure that rulemaking agencies follow the advice contained in this memorandum. Agencies could institute a policy of disclosing in the administrative file and the record for judicial review all material which your Office identifies as purely factual in nature, as well as the identified conduit material transmitted under (2) above. The agencies would have to develop procedures for memorializing the non-deliberative parts of oral communications from your Office. Your Office could assist the agencies in following these recommendations by rendering informal advice or by more formal instructions.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

January 17, 1979

MEMORANDUM FOR HONORABLE CECIL D. ANDRUS
Secretary of the Interior

Re: Consultation with Council of Economic Advisers Concerning Rulemaking under Surface Mining Control and Reclamation Act

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On September 18, 1978, the Office of Surface Mining Reclamation and Enforcement (OSM), acting pursuant to a delegation of authority from you as Secretary of the Interior under the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 445, 30 U.S.C.A. §§ 1201 *et seq.* (the 1977 Act), published in the *Federal Register* a notice of a proposed rulemaking. The notice (1) stated that the rulemaking was intended to establish "a nationwide permanent program for the regulation of surface and underground mining operations by the States and the Federal Government as required by" the 1977 Act; (2) set forth proposed rules; (3) announced that public hearings on the proposed rules would be held at certain designated places during October 1978; and (4) invited written or oral comments from the public on the rulemaking for the 60-day period ending November 17, 1978.

During the comment period the Regulatory Analysis Review Group (RARG), at the direction of the President, reviewed the proposed rule at issue here and submitted a report containing a number of comments on those proposed rules. The Council of Economic Advisers (CEA) serves as an active member of RARG, and participated in the preparation of the Report. After the close of the comment period, the Chairman of CEA, Charles Schultze, and the Assistant to the President for Domestic Affairs and Policy, Stuart Eizenstat, were asked to pursue further several questions related to the proposed rules. In light of the need for additional consultation between the President's economic advisers and your Department, this Office has been asked to consider whether -- and pursuant to what limitations -- CEA members and staffers might meet with you and members of your OSM Staff to discuss in more detail their concerns about several portions of the proposed regulations.

Specifically, we have been asked, first, whether there is any statutory or constitutional prohibition against meetings of this sort between your Department and the President's economic advisers. Secondly, we have been asked -- if meetings of this type within the Executive Branch are appropriate -- to work with the interested persons to develop and implement whatever procedures are necessary to assure compliance with the requirements imposed by recent decisions of the United States Court of Appeals for the District of Columbia Circuit.

For the reasons that follow, it is our conclusion that there is no prohibition against communications within the Executive Branch after the close of the comment period on these proposed rules. Nothing in the relevant statutes or in the decisions of the D. C. Circuit suggest the existence of a bar against full and detailed consultations between those charged with promulgating the rules and the President's advisers. The rulings of the D. C. Circuit, however, do suggest that it might be inappropriate for interested persons outside the Executive Branch to have so-called ex parte communicatons with you and your staff. If that is so, we think it logical to conclude that the D.C. Circuit would disapprove of CEA or other advisers to the President serving as a conduit for those same ex parte communicatons. In order to prevent CEA from serving as such a conduit, we recommended a procedure which is outlined in detail in the letter from this Office to CEA dated December 29, 1978 (a copy of which is attached). We have concluded that by adhering to these several procedural steps, as we understand your Department and CEA have done, there has been proper compliance with the law as it has developed in the D.C. Circuit.

I. PROCEDURE

We will begin by summarizing the several procedural steps discussed in our letter of December 29. These steps were fashioned in consultation with your Solicitor's Office and with the aid of the staffs at OSM and CEA. It is our understanding that each of the following items has now been implemented in accord with our suggestions.

(1) The CEA staff compiled a record of all of the oral and written communications they may have had with private persons interested in the proposed regulations. This catalog sets forth the content of all of these communications as accurately and fully as is possible. For the sake of completeness, it also includes recollections of CEA conversations with other Executive branch offices.

(2) Following receipt and review of this material, OSM made it available to the public in the document room at the Department of Interior. At the same time OSM published in the Federal Register for Thursday, January 4, 1979, a statement acknowledging, and explaining the reason for, this addition to the administrative record. The statement also announced the reopening of the record to allow comments on factual material contained in the submission. A period of eighteen days will be permitted in which appropriate comments may be submitted by the public. At the close of that comment period OSM will review and analyze these comments generally in the same manner in which it analyzed comments received during the original comment period. As an additional precaution to assure the widest public availability of these CEA documents, we understand that copies of the complete packet have been delivered to every Regional Office of your Department and that an effort was made to contact directly State governments that were likely to have an interest in reviewing this material.

(3) Once the compilation was made publicly available and the notice was transmitted to the Federal Register for publication, the Chairman and/or his staff conferred with OSM on particular portions of the proposed rules. It is our understanding that this first meeting occurred on Friday, January 5, 1979, and that there were a few, brief subsequent communications.

(4) Although we have been advised that no changes were made in the proposed rules as a result of these consultations, we did counsel that if any communications made during this consultation process did become in part the basis for the Secretary's final decision concerning the rulemaking, their relationship to that decision would be fully spelled out with the promulgation of the final rule.

There would, however, be no need to reopen the record again prior to the final decision unless you propose to rely on other information that was not included in the record at some stage and subjected to reasonable public comment in advance of your final decision.

(5) During the period of consultation, the participants were instructed to refrain from having any communications with other persons interested in the rulemaking, including other Executive branch officials, if those officials have either directly or indirectly had contacts with non-Government persons having an interest in this rulemaking.

II. PARTICIPATION BY CEA IN THE DECISIONMAKING PROCESS

The first issue can be simply framed: is there anything in either the Constitution or in the relevant statutes that prevents the President's economic advisers from conferring with you on these proposed rules? We think it plain that the basic constitutional presumption is one that favors communication and consultation within the Executive Branch in the course of developing rules and procedures. While there may be some matters of a quasi-adjudicatory nature as to which communication with the decisionmaker might be seen as improper, in the much larger category of executive actions barriers to free communication between and among the President's advisers should not be lightly assumed. The President is charged under Article II, Section 3 of the Constitution to ensure that the law are faithfully executed. In *Myers v. United States*, 272 U.S. 52, 135 (1926), the Supreme Court stated:

> The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone. Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President

> must consider and supervise in his administrative control. 1/

We believe that this language from Myers, although dictum, is a correct statement of the principle that Congress, in assigning rulemaking functions to Department Heads who are clearly subject to the President's removal power under Art. II, § 2, cl. 2 of the Constitution, must be assumed to have recognized the inherent power of the President to supervise the exercise of that power. We also believe that this supervisory power, which additionally finds support in your duty to report to the President concerning the discharge of your office, 2/ carries with it the constitutionally based right of the Executive to receive and give advice to his subordinates related to the discharge of their duties. See, e.g., United States v. Nixon, 418 U.S. 683 (1974).

The only substantial issue raised by the participation of the Chairman in the decisionmaking process is, in our view, whether Congress has attempted, by statute, to limit or otherwise regulate the participation by the Chairman or any other federal official not within your Department, in the decisionmaking process. We think the answer to this question is an unqualified "no."

Before discussing the statutes that might arguably place some limits on the Chairman's participation, we would observe that Congress has demonstrated a full awareness of the means by which it might attempt to regulate the interagency review of proposed rules. For example, in § 305(a) of the Clean Air Act Amendments of 1977, 42 U.S.C.A. § 2607 (d)(4)(B)(ii), Congress specifically required written comments made by agencies participating in the interagency review of rules to be placed on the record of the rulemaking conducted by Administrator of the Environmental Protection Agency. That provision also recognized that such written comments might be made at any point in the process, both prior to the publication of the notice of proposed rulemaking and after the close of the public comment period.

1/ We note that other language in Myers makes unclear whether the mode of supervision contemplated by the Court in the language quoted in the text above was limited to the power of removal or whether that supervision could take less drastic forms such as consultation. See 272 U.S., at 135.

2/ U. S. Const. art. II, § 2, Cl. 1.

We think it particularly significant that neither the language of § 305(a) of the Clean Air Act Amendments nor the legislative history of that provision suggests in any way that Congress was extending, or needed to extend, an affirmative power to the President (or the Office of Management and Budget acting at the President's direction) to conduct such interagency review. 3/ Furthermore, we believe that Congress' refusal to extend the regulations imposed in § 305(a) to oral communications was a recognition of the right of the President and his subordinates to communicate in confidence their views on issues raised by the rulemakings governed by that statute.

The question whether the relevant statutes, here § 4 of the Administrative Procedure Act, 5 U.S.C. § 553, and § 501 of the 1977 Act, 30 U.S.C.A. § 1251, in any way limit the authority to conduct interagency review of the rule in question may be dispensed with easily. Nothing in their text or their legislative history suggests an intent to limit or otherwise regulate the interagency review that has been accorded to this rule. Furthermore, we believe that the Supreme Court's recent decision in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 547 (1978), indicates that § 553 is itself an affirmative grant of power to the agencies to devise procedures that will be most congenial to the rulemaking conducted by them. Thus, we think it could not be questioned that a procedure adopted by an agency to secure the views of other interested agencies on specific rules is within the ambit of the power conferred by § 553. We therefore turn to the question whether the procedures set forth in part I above are a reasonable exercise of that power in this case. 4/

3/ See H.R. Rep. No. 294, 95th Cong., 1st. Sess. 319-20 (1977); H.R. Rep. No. 564, 95th Cong., 1st Sess. 177-78 (1977).

4/ Your Department has informed us that there have not been any departmental regulations in effect from September 18, 1978, to the present which would in any way conflict with the procedures set forth in part I above. We note that on August 10, 1978, a document entitled "Public Participation in Decision making -- Interim Guidelines and Invitation for Comment," was published in the Federal Register, 43 F.R. 35754-57, which generally sets forth your proposed Departmental policy regarding public participation in rulemaking. It would appear to us that nothing in those guidelines would be inconsistent with the procedures set forth in part I above. Nor would

(footnote continued on page 7)

III. The D. C. Circuit Cases

In two cases, Home Box Office, Inc., v. FCC, 567 F. 2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977), and U.S. Lines, Inc. v. Federal Maritime Commission, 584 F. 2d 519 (D.C. Cir. 1978), panels of the D. C. Circuit have indicated that so-called "ex parte"communications between persons interested in an "informal" rulemaking and the rulemaking agency must be generally disclosed on the record of the rulemaking. Those cases also indicate that, at least where such contacts may have substantially influenced or provided a basis for the rule finally adopted, their substance must have been subjected to adversary comment by other interested persons.

Although the Supreme Court's decision in Vermont Yankee, as well as decisions by other panels of the D. C. Circuit, 5/ cast considerable doubt on the correctness and applicability of these court-fashioned "ex parte"rules to the present circumstances, we believe that the procedures in part I above satisfy Home Box Office and U.S. Lines. The procedures were worked out with these two cases clearly in mind and reflect our best efforts to satisfy their several requirements. Specifically, these procedures accomplish two things. First, they place in the administrative record the substance of all so-called ex parte communications between private persons and the Chairman and his staff that have occurred since the notice of proposed rulemaking was published. Every document that CEA received and reviewed has been transmitted to OSM and the substantive details of every phone conversation have been disclosed to the full extent of the memories of those staffers who may have had such communications. Thus, in our view, there is no longer any reasonable likelihood that in meeting and discussing these proposed rules CEA will be transmitting any off-the-record ex parte information. Secondly, the procedures devised here give to any interested person the right to comment on those communica-

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4/ (footnote continued) this procedure appear to be in conflict with the notice of procedures for public participation issued by your Department on June 12, 1978 to establish policy regarding public participation in the pre-notice of proposed rulemaking stage of this rule, 43 Fed. Reg. 25381-82 (June 15, 1978), or the proposal of the rule itself, 43 Fed. Reg. 41 661 et seq. (Sep. 18, 1978).

5/ See Action for Children's Television v. FCC, 564 F. 2d 458 (D.C. Cir. 1977); Hercules, Inc. v. EPA, No. 77-1248 (D.C. Cir. Nov. 3, 1978) tions for a reasonable period of time. The reopening of the record for this limited purpose 6/ has been undertaken to assure that any information communicated by CEA and made a part of the record has been subjected to the fullest and fairest scrutiny. In fact, we have been advised both by the people at CEA and by your OSM staff that the predominance of material contained in these disclosures was already on the record developed during the comment period. Indeed, most of the information, insofar as CEA found it to be relevant to these proposed rules, was included in the RARG Report which, as you know, was made a part of the record during the comment period and was itself subjected to considerable public scrutiny.

The only question that remains under Home Box Office and U.S. Lines is whether it is required that the meetings and communications between your staff and the CEA representatives must themselves be placed on the public record. Neither case dealt with intra-Executive Branch communications; in both cases the *ex parte* contacts were from interested persons outside the decisionmaking process. Moreover, we think the purposes underlying the holdings in these two cases are fully served by a requirement that all contacts with persons outside the Government be disclosed. It was not the purpose of the D. C. Circuit to alter the ordinary way in which decisions are made by those charged with promulgating rules. Just as there is no bar in those cases against consultation between the Secretary and

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6/ It might be contended that reopening the record for the restricted purpose of allowing comment on the CEA disclosure document is somehow unfair to other interested persons who might wish to make additional comments after the 60-day formal comment period closed. Indeed, we understand that a number of comments have been received by OSM after the close of the comment period but that the Office has declined to review and consider them. It is our judgment -- as stated in our letter of December 29 -- that a limited reopening is appropriate in this case. The purpose of the reopening is quite simply to assure closest compliance with these D. C. Circuit decisions while allowing Executive Branch officials to fulfill their responsibilities. As the disclosure documents prepared by CEA demonstrate, this procedure was not intended to provide -- nor will it have the effect of providing--a means of funnelling tardy industry or other interested persons' comments to the agency decisionmaker. Virtually all the comments received by CEA were ones made during the public comment period, and virtually all of them are ones already in the record. Given these facts, we think it reasonable to reopen without launching anew the rulemaking process.

his Assistants in confidence, we find no bar to communications from others within the Executive Branch so long, of course, as those communications are not the vehicle for the indirect transmission of some off-the-record, ex parte information from interested persons outside the Government. For the reasons outlined in our earlier discussion of the role of the Chief Executive in overseeing the rulemaking process, we would be very reluctant to infer a prohibition or other restraint against a full exchange of views between the President's advisers. To the contrary, Congress has frequently demonstrated a sensitivity to the need to preserve open lines of communication for the exchange of views and to improve the deliberative process within the Executive Branch. Exemption (b)(5) in the Freedom of Information Act, 5 U.S.C. § 552 (b)(5), stands as the clearest evidence of Congress' continuing acknowlegement of the need for such confidential communications.

Finally, we should reiterate our conclusion that to permit confidential communications between your Department and the President's economic advisers will not frustrate the basic requirements of the Administrative Procedure Act and of the 1977 Surface Mining Act that the foundation and rationale for your ultimate rulemaking determinations be spelled out and be subject to close public and judicial scrutiny. To whatever extent your views are premised upon economic or other considerations arising in the course of your discussions with CEA, those considerations must (1) have their origin somewhere in the record you have developed over the last few months, and (2) be articulated in your final rule. These requirements having been met, and the other procedures outlined in our letter of December 29 having been satisfied, we see no substantial basis for a claim that the rules themselves are arbitrary or capricious, or that the rulemaking process was otherwise flawed.

Larry A. Hammond
Acting Assistant Attorney General
Office of Legal Counsel

Attachment

Assistant Attorney General
Office of Legal Counsel

Department of Justice
Washington, D.C. 20530

JAN 25 1979

Honorable Henry M. Jackson
Chairman, Committee on Energy
and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The purpose of this letter is to express the Department of Justice's concern regarding the hearing scheduled by your Committee for February 5, 1979 to inquire into the surface mining rule presently under consideration by the Secretary of the Interior. For the reasons set forth below, we would urge you to postpone the hearing until after the final rule has been promulgated by Secretary Andrus (a period of about 10 days).

As set forth in the enclosed legal opinion issued by this Office to Secretary Andrus on January 17, 1979, we have provided both the Secretary and the Executive Office of the President with our counsel in recent months regarding the surface mining rule. Our advice in this period has been responsive to two main objectives: (1) to provide for participation in the final decisionmaking process by the President's chief economic advisers, including Chairman Schultze of the Council of Economic Advisers; and (2) to ensure that the final rule will survive judicial scrutiny on procedural grounds in the D.C. Circuit. To achieve the latter objective, we devised procedures, subsequently implemented, to ensure that the final decision by the Secretary would not appear to have been improperly influenced by communications from persons outside the Executive Branch, so-called *ex parte* communications, after the close of the public comment period on November 17, 1978.

As you may be aware, a civil action challenging both the propriety of Presidential participation in this rulemaking and the adequacy of the procedures implemented by the Secretary and the Executive Office of the President was brought by the Natural Resources Defense Council and other environmental organizations. Yesterday, Judge Flannery of the United States District Court granted our motion to dismiss that civil action on jurisdictional grounds. The plaintiffs in that case, however, made clear their readiness to renew these challenges immediately upon the Secretary's promulgation of a final rule on or about February 15, 1979.

The legal issues that will be litigated with regard to the final rule are both novel and complex. We believe that the right of the President to supervise his Cabinet officers in carrying out their statutory responsibilities is firmly rooted in the Constitution. The manner in which this power may be exercised is, however, left somewhat uncertain by decisions of the D.C. Circuit*/ and it is these decisions upon which the Natural Resources Defense Council placed primary reliance in the recent civil action.

In addition to the decisions dealing with the "improper" influence of off-the-record communications in informal rulemaking, the D.C. Circuit has recently decided two cases which presented the question whether and under what circumstances Congressional involvement in informal rulemaking would be improper. Those cases, D.C. Federation of Civic Associations v. Volpe, 459 F.2d 1231 (D.C. Cir. 1972), and Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir. 1978), both involved administrative decisionmaking under procedures analytically indistinguishable from those which govern the surface mining rule. Both cases, in our opinion, cast serious doubt on the propriety of the February 5 hearing.

We would emphasize that any consideration of the import of D.C. Federation and Koniag must take into account the overall circumstances under which the surface mining rule has been developed. We have concluded that any discussion of the substance of the proposed rule at the February 5 hearing would be fundamentally inconsistent with the advice we have given the Secretary with regard to ex parte communications. Because of the overriding need to ensure that the final rule is not invalidated by the D.C. Circuit so that the rule can be implemented by the States in a timely manner, we hope that you will agree that the hearing should be postponed until after a final rule is promulgated by Secretary Andrus.

Sincerely,

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

Enclosure.

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*/ Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); U.S. Lines, Inc. v. FMC, 584 F.2d 519 (D.C. Cir. 1978).

Chairman Roth. At this time I would like to call an old friend and distinguished economist, Alan Greenspan. Dr. Greenspan, as always, is most helpful. I particularly appreciate his coming to Washington today.

The committee will please be in order.

Alan Greenspan is particularly good to come today because I understand he has to return to New York this afternoon only to return to Washington tomorrow.

Alan, nice to have you here.

TESTIMONY OF ALAN GREENSPAN, ECONOMIST, TOWNSEND-GREENSPAN & CO., INC.

Mr. Greenspan. Thank you very much, Mr. Chairman.

I appreciate the opportunity to discuss why it is especially urgent to ease the regulatory burden at this time. Most of the ongoing debate on the impact of regulation has emphasized the impact on the price level of increased costs of production and capital facilities mandated by the new statutes initiated during the past 10 to 15 years.

Fortunately, the level of regulation has not yet reached the point where inflation is high because regulation is excessive. Regulation contributes to, but is not the major determinant of, inflation. But what has not been sufficiently stressed is that regulation's impact on inflation is not uniform at all levels of inflation rates. In fact, it is becoming increasingly evident that the deleterious effect of any given level of regulation is far greater when the general rate of inflation is high than when it is low.

Regulation affects the rate of inflation in two ways. First, regulatory costs, by increasing direct costs of production and capital facilities, eventually work their way into the general price level. Part of the incidence of increased costs is assuredly to reduce competitive volumes and/or profitability, but virtually all regulatory costs find their way into the consumers' price level.

Running parallel to the direct cost effect is the financing of these expenditures. Increased regulatory production costs affect the costs of goods in process and, as a consequence, raise the value of inventories, which must be financed.

Capital facilities mandated by environmental and safety regulations must be financed in a manner similar to all capital facilities. Generally, one can view the production cost effects on inflation and the credit increasing impacts on the financial system as merely different aspects of the same regulatory processes' effect on inflation overall.

The level of regulatory costs generated in the production of goods and services tends to induce a rate of bank credit expansion and, hence, of money supply growth, which is generally consistent with the regulatory cost impact on the general price level. That is, one can evaluate the inflationary impact of regulation by observing either the direct cost impact on the price level or its financing impact on overall credit creation and money supply expansion. If there are disparities in impacts, it is likely that the financing impact will prevail.

The impact of regulatory costs on production costs and prices reflects the level of regulation. If the level of regulation is frozen at any particular time, so do, by implication, the costs of meeting it; that is, the rate of inflation engendered by regulation falls to zero since the price level is no longer increasing as a consequence of regulation. Moreover, in periods of very modest inflation, it is also likely that the aggregate borrowing requirements also cease to increase, and the impact on inflation evaluated from either the cost side or the financing side is the same.

However, in periods of high inflation, when there is already a very significant amount of aggregative credit mandated by the Federal Government, direct and indirect, the impact of regulatory financing could very well be multiplicative. In today's environment, for example, it is not so much the on-budget financing of the deficit that is creating our inflation problems. Indeed, other countries have larger deficits relative to their GNP's and lower rates of inflation. It is the vast amounts of credit preemption by the Federal Government, including guarantees and off-budget financing, that is placing excessive inflationary pressure on our system.

Total direct and indirect Federal Government credit requirements have risen from 25 percent of net funds raised in our financial system a decade ago to 36 percent currently.

The growth of federally induced borrowing suggests that aggregate demand has been chronically in excess of supply. The rising interest rates that occurred as the aggregate amount of credit exceeded the available ongoing private savings tended to crowd out the more interest-sensitive private borrowers and effectively forced them to their commercial banks to make up the difference.

This induced commercial banks, in order to meet the "crowded out" credit requirements of their customers, to bid for Federal funds; that is, reserve balances, and the Federal funds rate as a consequence rose sharply. The Federal Reserve as usual attempted to slow that rise, in part by supplying the banking system with additional reserves. It was the additional reserves which, by increasing the monetary base. supported excessive increases in the money supply and, eventually, the price level.

However, not included in the official credit requirement numbers of the Federal Government is the amount of credit which is indirectly mandated by regulation. It does not matter so far as the financial markets are concerned whether, for example: One, the Federal Government raises funds in the capital market through the sale of Treasury bonds and uses the proceeds to subsidize an electric utility to buy a scrubber to meet environmental requirements, or, two, the Federal Government grants the utility a Treasury guarantee on its financing, or, three, the Government merely mandates that the utility meet the regulatory requirement to buy a scrubber and to finance it on its own. In all three cases, there is a highly interest-insensitive demand for funds in the market.

Borrowing induced by regulation has much the same crowding out effect as direct U.S. Treasury borrowing. But crowding out tends to create self-perpetuating money growth and inflation. The higher the rate of inflation, the greater the demand for credit and the greater the upward pressure on money supply growth.

Thus, in periods when we already have a high degree of Federal borrowing-induced crowding out, the additional borrowing created by regulation tends to set into motion a degree of ongoing inflation far beyond the direct inflationary effect of a specific level of regulation.

Thus, the reduction of regulatory burdens not only eases the impact on production costs, but to the extent that it reduces the mandated financial requirements of regulation, the impact on the financial system is probably disproportionately large. It eases at the margin the requirements of federally sponsored financing with an out-sized impact on the price level and inflationary forces in general.

Regulation during periods of high inflation is harmful to the economy for another reason, which may in the long run be more important than its credit impact. During periods of high inflation, risk premiums and interest rates, what economists call the hurdle rate of return, is significantly higher. This is the minimum rate of return which a business requires to initiate any particular capital project.

While long-term nominal dollar profit expectations are higher in a period of expected inflation, the additional risk premiums associated with the inflation uncertainties create a rise in hurdle rates which more than compensates for the inflation-generated rise in expected earnings. As a consequence, inflation tends to suppress capital investment. More importantly, because of the inevitably far heavier discounting of long-range profit expectations during periods of high hurdle rates, capital investment with long-term payoff expectations and with little in the way of short-term profit potential is suppressed. Hence, we get during periods of inflation a disproportionately large amount of investment in short-lived assets, that is, those with a quick cash payoff.

Thus, to the extent that regulation increases construction and planning delays, it exaggerates the impact of high hurdle rates of return and disproportionately impacts the building of new supply-expanding facilities.

For example, curtailments of projected nuclear powerplants have been heavily impacted by lowered expectations of longrun demand and by the costs of maintaining high margins of environmental safety. However, the 12-year average now required between initiation and operation of a nuclear facility has become so onerous at high interest rates that even the most economically feasible project would have great difficulty meeting current investment hurdle-rate criteria. At low hurdle rates and low inflation, 12-year leadtimes would be a far less onerous or negative factor.

Deregulation is thus a major element in any program to defuse the inflationary pressures currently confronting our economy. In doing so, I hope the Congress will address the bias that exists in any regulatory sytsem.

Like all human beings, regulatory bureaucrats seek to maximize their self-interest. A drug regulator, for example, gets no credit if a drug company creates a miracle drug that saves millions of lives. Moreover, he receives little, if any, criticism if he delays or bans the drug. Few are aware of great innovations that never reach the market. On the other hand, the regulator receives great accolades if he bans thalidomide; harsh criticism if he does not.

With this set of trade-offs facing the drug regulator, and, in fact, regulators in all areas where life or health considerations abound, it is no wonder that there is a strong regulatory bias toward the suppressing of the inventive and the productive.

It is thus essential that the Congress recognize that the regulatory burden will, left to its own devices, inevitably grow, and ultimately stifle, innovative activity subject to regulatory review. To avoid this process from taking hold, it is essential to create a far better regulatory balance. We need to eliminate the bias that is built into our regulatory system. One way to redress the bias we have created is to require that all congressional legislation and broad regulatory policy be subject to sunset provisions. This would enforce a review and a reaffirmation of those policies that remain sound.

Thank you very much, Mr. Chairman.

Chairman ROTH. Thank you, Mr. Greenspan.

The point you make in the closing paragraphs of your statement is indeed a troublesome one. I must confess that I am not certain at this stage of the answer. I make reference to your criticism that the incentive for the regulatory bureaucrat is to play it safe and refuse permission to new products, at least until such time that he is reasonably certain that he isn't going to be criticized because of any harmful fallout from that product.

I wonder if you have any suggestions as to how to develop a better balancing in this kind of a process because, as you point out, you may lose lives not only because an improper product is produced and marketed but also by the delay of a new wonder drug that would have saved many lives.

Would it make better sense to try to use litigation, greater liability on the manufacturer so that he would be more careful? Who is in the best position to make that kind of evaluation?

Mr. GREENSPAN. The reason I chose this particular example, Mr. Chairman, is that it gets to the root of the type of problem that all of us confront with this type of regulatory bias and concern. Nobody wishes to position oneself in a regulatory system where there is no mechanism which will prevent dangerous drugs from going into the system. And yet it is a terribly difficult balance to make. I myself personally find the recommendation that you make probably the best one. Having worked with the business side of regulation for a long time it has always struck me that one has to have a quality product to succeed.

There is very little which individual drug manufacturers can do to improve their product more than obviously coming out with some extraordinarily effective drug. There is no question, for example, that airline safety is an issue which the airlines themselves are most desirous of maintaining as the commercial requirement. I would therefore tend to lean toward the area where you give full rein to the creativeness of business to bring products forth but stand back and prosecute fraud and misrepresentation and impose very heavy penalties if they bring to market products which are harmful to health or safety.

I would suspect that that, as far as a balance is concerned, would bring the maximum degree of quality of products and service to the American people.

Chairman ROTH. There are those who say one of our problems today is that we want a risk-free society, and that in the process we are creating a stagnant economy.

I would have to say that I think part of the responsibility lies not just with the regulator, but the Congress, because it is very popular, as you well know, that anytime anything goes wrong to jump upon the regulator and hold him responsible. So I think that gives great incentive to the regulator to be as cautious as possible in granting approval for new products.

I can't think of any legislation, really, to govern statements of the Congress, but I do think that is part of the problem.

Senator Levin?

Senator LEVIN. Thank you, Mr. Chairman.

Dr. Greenspan, is there a difference in the inflationary cost of regulations depending upon whether they emanate from independent regulatory agencies, or from executive branch agencies?

Mr. GREENSPAN. In principle, no. I mean, there is no reason why the form of the construction of the regulation or its means of implementation biases it one way or the other. It is the nature of the regulation rather than the particular organizational means of implementing it.

Senator LEVIN. Are you able to say, for instance, whether or not the regulations which we get from, say, HUD, DOE, Department of Labor, HHS, on the one hand, compared to FTC, FCC, FAA, and other independent regulatory agencies on the other hand are more or less inflation?

Mr. GREENSPAN. No, not in principle. I think there are differences, but that largely reflects the nature of the agencies involved and the longevity of the personnel who work for them.

Senator LEVIN. Do you know, considering those very practical factors which you just mentioned, whether in fact the regulations, putting aside the principle, but whether or not in fact the regulations we get from the independent agencies are more or less inflationary than the ones that we get from the HUD and Energy Department and Labor Department?

Mr. GREENSPAN. Senator, I would suspect that the difference is probably more involved in whether a regulatory agency is new or old. I think that, without generalizing in every respect, I would suspect that the more recent regulatory agencies are creating costs both direct on business and through the financial system far greater than the other agencies did which tended not to get involved in the cost-creating activities.

Senator LEVIN. That would be regardless of whether they are in the executive branch or in agencies?

Mr. GREENSPAN. That is correct.

Senator LEVIN. Dr. Greenspan, is it possible that deregulation can be inflationary? Let me give you some examples. Could the reduction of regulations, say, in the workplace which might result in additional injuries or accidents or which might result in additional hospitalization be inflationary although it might be difficult to measure it?

Could deregulation be inflationary or could the deregulation of narcotics, for instance, result in greater addiction, greater inflationary costs to society?

Mr. **Greenspan**. It is possible, but I would be very doubtful, that deregulation in the safety area, for example, under the various statutes under which OSHA is functioning, would have increased accidents.

I think that is a very questionable area. But I will grant you it can happen. But, I would be very much disinclined to argue that deregulation was the cause of inflation. The evidence is so overwhelming in the other direction that I am not certain that we add much to our knowledge of the whole process by saying that deregulation can have both deflationary and inflationary effects.

It is remotely possible in specific examples, but I would say that without qualification deregulation reduces inflationary pressures.

Senator **Levin**. That would be the overall sum of deregulation, the final end product you would say, but let me just pressure you a bit further. Can't the effect of deregulation be, assume with me just for the moment that the effect of a deregulation would be additional access. That is something that I am not equipped to know.

Mr. **Greenspan**. Nor am I.

Senator **Levin**. I am going to have to assume it for the purpose of argument that somebody can demonstrate that if you eliminated this particular safety requirement, to cover the eyes, whatever it is, that there would be more accidents and injuries and if someone could prove that, could that deregulation which could lead in effect to greater medical costs and hospitalization, would that be inflationary, in that sense, regardless of the overall equation?

Mr. **Greenspan**. Yes; if the costs involved in the total system were greater than the savings. Yes; I would say in that particular instance, it would be.

Senator **Levin**. Have you seen any analysis that looks at the inflationary costs of deregulation or the costs of it, not in terms of pain and suffering, although that is obviously significant and important, but in terms of the actual costs to the system, whether it is a hospitalization system or a policing system, or some kind of social services which might result from deregulation? Has anybody that you know of taken a model, looked at the particular regulations and actually tried to pinpoint the actual costs that might be inflationary?

Mr. **Greenspan**. I think that when any form of benefit-cost analysis is made that type of activity is attempted. I don't recall very specific cases in which one could validly demonstrate that a specific major regulatory change or easing of regulatory burden would be inflationary.

I have never seen any. I am not saying one cannot produce one. As the chairman said earlier, one can always find an economist to support most any position you want, but I myself have never seen that or suspect it is something which is readily demonstrable.

Senator **Levin**. Thank you.

Chairman **Roth**. Just a couple more questions. Mr. Greenspan, one of the concerns I have is that you not only have the Federal regulatory system, but of course you have the State and local as well. I find in talking at least to some of the business people that they don't like the Federal regulatory system, but when they begin talking about State and local, they on occasion will even ask the Federal Government to move into the picture.

Do you believe that there is any need to address this kind of overlap? For example, taking the case of the environment, you not only have the national law but many State laws. Do you see this as a serious problem from the standpoint of developing an economy of growth?

Mr. Greenspan. I think it is a problem, Mr. Chairman. How serious it is, I am not expert enough to judge. What has struck me watching this whole process expand over the last 10 or 15 years is the sense in which there is an incoherence in how regulation develops, how the problems are identified and addressed.

It has always struck me that had the environmental movement emerged 5 years later than it actually did, meaning after rather than before the first energy crisis explosion in 1973, the form of regulation that evolved as a consequence would have been quite a good deal different from what actually emerged.

What has struck me about the way we have come at this is that not only have we had the incoherence which I think Dr. Weidenbaum was referring to before in the Federal system, but there has been a lack of coherence and understanding in the interrelationship between State and local regulatory processes and Federal. And the answer to your question is, yes, I do think this should be addressed. The Federal Government cannot alter those State and local regulations, but at least it can be aware of them so that, in effect, our statutes are consistent on the Federal level.

Chairman Roth. I would agree with that. I certainly wouldn't recommend that the Federal Government should preempt all of these areas because I think that would create a far more serious problem. Dr. Greenspan, I appreciate your coming. I think it is helpful to have your testimony which underscores that the regulatory maze that we have developed is an inhibiting factor in developing an environment of growth.

I would welcome your future suggestions. I think there are some of these areas where there has to be some kind of regulation, that we need to look, or at least the goals are desirable and if we don't like the President's regulatory maze, how do we achieve those goals without dragging down the economy in the process? We will be working on further approaches of that kind and we will undoubtedly contact you. Thank you very much for being with us today.

Mr. Greenspan. Thank you, Mr. Chairman.

Chairman Roth. Finally, I am pleased to call up Richard Smith, chairman, Coordinating Group on Regulatory Reform, American Bar Association.

TESTIMONY OF RICHARD B. SMITH, CHAIRMAN, COORDINATING GROUP ON REGULATORY REFORM, AMERICAN BAR ASSOCIATION, ACCOMPANIED BY J. WILLIAM WARFIELD ROSS, MEMBER, AND PETER L. STRAUSS, CONSULTANT

Chairman Roth. It is nice to see you twice within a very short period of time. You can either read your statement or summarize it. Then I would like to ask you some questions.

Mr. Smith. Thank you, Mr. Chairman. We are pleased to see you again.

I would like permission to dispense with the reading of my statement and request its introduction into the record.

I shall attempt to briefly summarize it. I first would like to introduce my colleagues at the table. On my right is William Warfield Ross, who is a member of our coordinating group and a past chairman of the administrative law section of the bar association; on my immediate left is Peter Strauss who is a professor of administrative law at Columbia Law School in New York and has served as a consultant for our group and who has also done a good deal of work on the question of Presidential authority with respect to agency activity.

My statement discusses, Mr. Chairman, regulatory reform generally in terms of the roles of each of the three constitutional branches of Government. And that discussion leads us to support generally most of the provisions of S. 1080. It also leads us to suggest certain improvements which we believe are necessary.

It also leads us to emphasize that much more than S. 1080 needs to be done to achieve meaningful regulatory reform. Chief among those is the role of the President. That has been a subject of discussion already this morning. We have emphasized that in a number of different appearances before congressional committees for the last 3½ years. It is an important principle in the book entitled, "Roads to Reform" that constituted the report of the American Bar Association's Commission on Law and the Economy, including recommendations that were approved by the House of Delegates to our association.

With respect to S. 1080, we think that it is essential that there be some degree of Presidential involvement in the treatment of regulatory analyses. Most of those reasons were averted to this morning. We can see no way in which the necessary flexibility and outside involvement, involvement outside the agency, can be efficiently introduced into the system except through the Office of the President and most logically through the Director of the Office of Management and Budget.

Beyond S. 1080 and its regulatory analysis provisions, as you know, Mr. Chairman, we would be supportive of an enhanced role in regulatory government for the President's office subject to appropriate congressional checks. And we thought that the concepts in the bill that you introduced last year, most of them in any case, were to us virtually implementation of the recommendations, recommendation 3, of the Commission on Law and the Economy of the ABA. So we are in full sympathy with that need. We think the Congress in due course will certainly have to address that issue if the country is to have a coherent national economic policy. We have significant difficulties in seeing how that can be accomplished through the existing system of multitudes of regulatory agencies in the Government.

That leads me to what is the appropriate role of Congress in relation to both the Presidency and regulatory actions. We have always been sympathetic and supportive of a reasonable form of sunset mechanism. The sunset legislation proposals—we think perhaps a better term would be periodic reauthorization—are aimed at existing regulation. We support seeking to find some form of a forcing mechanism for the Congress to address existing regulatory programs with the ultimate objective of course of substantive deregulation or reregulation. But a reexamination of the regulatory programs which may have outlived their usefulness, are duplicative of other regulatory programs, that is a laborious, often difficult and unglamorous legislative task. There is no other branch of Government that can undertake the task which so desperately needs to be undertaken.

In addition to that sort of attention to deregulatory subjects we think that further attention should also be given to procedural reforms. Last year's bills contained a provision, for example, that was our suggestion on how to expedite the adjudicatory proceeding procedure. We called that modified hearings. The bills last year called it expedited hearing. That has been dropped entirely from S. 1080.

S. 1080 instead addresses itself in rather far-reaching provisions to section 553 of the APA dealing with informal rulemaking. It is quite clear to us that strains exist in the adjudication rulemaking separations and classifications in the Administrative Procedure Act. We have no policy position on addressing the rulemaking side of that problem, which attempts to introduce trial-type procedures into informal rulemaking. We do have a policy supportive of the approach from the other side at attempting to address the legislative-type treatment of issues involved in adjudicatory proceedings. They are two sides of the same coin that can and should be appropriately looked at together.

That leads me to where we discuss the role of the courts. We have two things to say about that. One is that with respect to regulatory analyses we would strongly urge that any role of the courts be removed. In last year's bill after extensive consultations with both the Governmental Affairs and Judiciary Committees of the Senate we arrived at language that we thought appropriately reflected the way in which to express judicial treatment of regulatory analyses. That was to say that the performance of regulatory analyses was flatly nonreviewable, but that any regulatory analysis developed would be made part of the materials that a reviewing court could look at in deciding whether the rule had been validly adopted. That is significantly changed in one of the provisions in S. 1080 which would give a court in certain circumstances, a greater power to review, possibly to get into whether or not there is a major rule or not. We think that is not to the good.

At the same time, we are supportive of the general judicial review provision, the so-called Bumpers amendment which was first introduced by Senator Bumpers. We think that that is the proper functioning of the judicial role. It could lead, at least with respect to new legislation, to greater attention on the part of the Congress to draft legislation to do precisely what is intended. It will be something of a check on what has heretofore been a willingness of courts to let agencies go to the outer bounds and even beyond the jurisdiction or the authority that Congress had in mind when they created the agency. We do have some concerns of the effect of that amendment on attention to deregulatory matters. There are a few minor suggestions in language addressed to that point.

Rather than continuing, Mr. Chairman, except to ask either of my colleagues if they would like to add something, I would be able to stop at this point and open ourselves to questions.

Chairman **Roth**. Mr. Smith, as you know, one of my key concerns in the Government process is that what you deal with, coordination of national economic policy, I fear that nothing we are considering really addresses the problem of how to develop a coherent national policy, so long as we have so much of the rulemaking being done by various agencies and departments, both within the executive branch and also outside as independent agencies. Nowhere is there any mechanism for consideration being given as to how to reach the accommodation of these conflicting interests. We have all read these stories where the individual regulator says that is not his concern, and he is right under the law. His responsibility is to administer the law that created his agency.

We have had some discussion of this proposal that I introduced last year giving certain limited authority to the President. But even that is of limited impact and there is a question as to how much a president or his staff could accomplish in addressing these problems.

Do you see any need to try to create some new kind of mechanism in the regulatory process whereby some agency or some advisory group could point out the impact a proposed rule would have not only under one law, but under other legislation on the books?

Mr. **Smith**. I think I may respond to that in this way, Senator Roth. There are three levels that are contained in the question. One is with respect to the formulation of national economic policies generally, a question as fundamental as approaches to energy conservation and oil allocation, how does one fight inflation, whether employment objectives are consistent or how should you approach the problems of full employment.

What are the mechanisms within the Government for the formulation of such general overarching policies? That is a question separate and apart from that of regulatory agencies. But it is a fundamental question about which we don't appear to have been terribly successful. Are the governmental structures appropriate and sufficient for bringing the best forces of the country to bear on the development of national economic policy.

The second is, whatever and however those policies are arrived at, the content they have, how do you then relate the regulatory apparatus of the Government to them? How do you coordinate with them? How do you display through the regulatory apparatus the meaning of the coherent national economic policy? The system of independent agencies each with a specialized task, as valuable as that has been, is a very difficult obstacle to the implementation of whatever the national economic policy is. It is to that level we gave limited address in the prepared statement.

We think more could be done. Conceivably if it were addressed in a full-blooded enough manner, one might think there could be more drastic or more far-reaching changes. The not so drastic change the Commission on Law and the Economy thought of has not received a great deal of support generally, so there may be some need for a forum that could further develop the relationship between such proposals and the problems to which they are addressed. I think people feel there is a real problem, that economic policy is not being well formulated or implemented, that there is a great problem of overregulation and burden on the economy and the question is how you address that. On those questions, at least so far as any far-reaching solution, there is rather little agreement.

The third level at which I think your question is addressed is how can you involve the resources in the private sector in some reasonable fashion in the formulation of specific regulatory policies?

There are impediments to doing that under the case law that has developed and under the Federal Advisory Committee Act. We have made a rather modest proposal which is contained in the report of the Commission on Law and the Economy in this respect—recommendation 10. We think that thought should be given to an agency's ability to bring citizens together, people from regulated entities and people affected by those entities, in more informal fashions to achieve appropriate forms of regulation. We believe that is an area to which additional thought and attention should be given.

All of this goes beyond S. 1080. Our strong appeals for going beyond S. 1080 is not to say that we don't think it is an appropriate degree of legislation at this point in time.

Chairman **Roth**. Gentlemen, the hour is growing late. I would just say that I must say that I think that the President or his Office has to be the balancing mechanism somewhere in the process; and that he must have some input beyond the executive branch, at least that is where I would come out on this point.

Where I would disagree perhaps with the position of the bar is that I think that if you are going to broaden Presidential power, then the Congress is going to want to retain certain rights to insure that the laws that are on the books are complied with or changed.

I think, for example, when I introduced the balancing mechanism legislation last year, it was alleged that it would totally undermine the independent agencies. I am not sure that is true because the President only has authority to act within the law, not outside the law.

However, to address that concern, it does seem to me that some kind of a veto might be appropriate. I don't think personally that is going to be something that is going to be used greatly for the simple reason that the committees currently don't undertake the necessary oversight and I don't think they are going to do that in the case of regulations, either.

But it does give the power or reserve the right to the Congress to intercede in those cases where they feel that the President has not acted not in accordance with the wishes of the Congress. As I said earlier, I dismiss the constitutional problems because, and I will be very candid with you, I just think that depends upon the mood of the particular Supreme Court.

I don't think it is any more shocking today to say that the veto would be constitutional than it was as I indicated earlier, that the Court ultimately agreed that Congress would broadly delegate. I would just say that is where I sort of come out as an approach today. I would be interested in your comments.

Mr. **Smith**. If your mind is not totally made up, may we make some comments on that position? Perhaps my colleagues would disagree. Speaking personally, I think that the constitutional questions are a little more severe than simply the sociological attitudes of the persons who review them.

Peter, would you want to speak to that question?

Chairman ROTH. I might say that I am able to comment very intelligently, having not done any research on that. [Laughter.]

Mr. STRAUSS. Mr. Chairman, I do think that you put the point in a very effective way, that the important and first element is to assure effective Presidential oversight, subject in turn to congressional check in some form; if there is a disagreement across this table it might be disagreement about what form that congressional check should take. I believe the bar sees in S. 1080 a mechanism that would bear on this problem, but bear on it in the wrong direction. By placing supervision of the regulatory impact analysis process in the courts rather than in the Presidency, in hindsight rather than in management, the Congress would be taking a step away from rather than toward the kind of coordination which I think we agree is essential.

When it comes to the constitutional issue, I personally find it very hard to disagree with the remarks of Senator Levin.

I think as well that as long as it is clear that the Congress is exercising oversight of Presidential political judgment in the political marketplace, that one has a much more arguable position than if Congress were taking the position that each and every regulation that came out of an executive agency or an independent agency would be subject to oversight before the Congress. The intensive supervision suggested by legislative veto would produce a fragmenting of Government which would not be present if the Congress were to limit its oversight activity to reviewing the President's performance of his coordinating role.

The bar's position on legislative veto is that the Congress ought to act in a political rather than a legal way—by enacting resolutions calling for executive action, by maintaining control over the President's authority to exercise this kind of oversight rather than by reversing the President on particular judgments that he might make. I personally think that choice is more a political one than a legal one and I would expect the legal question to be closely argued.

Chairman ROTH. Why are we different in this area than in the reorganization area?

Mr. STRAUSS. For overseeing Presidential as distinct from agency action the same arguments apply. In reorganization measures you are dealing with a specifically Presidential exercise of authority rather than an exercise of authority by one of several dozen agencies. The question which has been raised in the past about legislative veto has been that Congress might seem to be defeating the President's own authority to supervise the way agencies execute the law or to exercise a veto over congressional action. But in the setting that you posed, where the Congress directs itself specifically to the President's own actions, there is no risk of excluding a full Presidential role. Where Congress is exercising a political check over Presidential action rather than seeming to exclude him from the business of executing the laws, in my judgment, the constitutional argument is at its weakest.

I don't want to predict its outcome.

Chairman ROTH. There may be better techniques. I have not closed my mind. But I do feel very strongly that the resident has to be in a posture where he can act as a balancing mechanism, at least. I also believe that in order to broaden that authority that Congress is going to insist on some kind of a mechanism to protect its responsibility.

Veto may not be the answer. Oversight has proven totally inadequate in the past. One of my concerns, and this is true of the legislative veto, is that we keep adding new procedures, new responsibilities as to how Congress must act and we can't function under current procedures. I think one of the real problems is the need to simplify the legislative process. So I feel—I don't mean to say that that is my final decision, but I do generally feel that in both of these areas the problem has to be addressed.

Mr. SMITH. It certainly seems to me, Senator, that the thrust of your comments are to be against, would be inconsistent with, the legislative veto of individual agency actions; but sympathetic to a President's intervention in the regulatory apparatus with some sort of congressional check on that Presidential intervention.

And I think that our general policy is very supportive of that.

Chairman ROTH. Incidentally, as you know, I, too, am very much concerned with letting too much of the process end up in the courts.

I agree with your comments in that area. That is one of my great criticisms. Somehow there has to be some decisionmaking even in the regulatory process.

Gentlemen, I apologize for keeping you through the lunch hour or most of it. But I do find your comments and testimony very valuable. We will look forward to your continued comments as we proceed with this and other legislation in this area.

[The prepared statement of Messrs. Smith, Ross, and Strauss, and response of Mr. Smith to a written question submitted by Senator Eagleton follow:]

PREPARED STATEMENT OF RICHARD B. SMITH, WILLIAM WARFIELD ROSS, AND PETER L. STRAUSS

Mr. Chairman and Members of the Committee:

My name is Richard B. Smith. I am a practicing lawyer in New York City. From 1975 to 1980 I served as Vice Chairman of the American Bar Association's Commission on Law and the Economy. At present, I am Chairman of the Association's Coordinating Group on Regulatory Reform. This Group seeks to coordinate the work and views within the Association on the subject of regulatory reform and to present the views of the Association on that subject to the legislative and executive branches of the national government. I appear here today at your invitation, Mr. Chairman, in that capacity. I might also add that from 1967 to 1971 I served as a Commissioner of the Securities and Exchange Commission and from 1971 to 1974 as a member of the Council of the Administrative Conference of the United States.

The American Bar Association has greatly appreciated the opportunity to work with the Committee on Governmental Affairs over the last several years on the subject of regulatory reform. We are hopeful that the new Congress and the new Administration will bring success to the difficult work of crafting effective measures to that end. Certainly we are impressed with the extraordinary and bipartisan support S. 1080 has already achieved. We are generally supportive of the concepts in that bill. We wish to be helpful in the process of bringing it to fruition. What concerns we do have, we hope, should be resolvable.

President's Role. An issue of particular interest to this Committee is: what expression, if any, should Congress give to the role of the President and his immediate advisors in overseeing the conduct of regulatory affairs. This is not addressed in S. 1080. While we approve much in the draft, we regard this omission regrettable as it affects regulatory analysis. As you may know, the President's role had the special attention of the ABA's Commission on Law and the Economy. I believe our deliberations raised issues and produced perspectives which will be helpful to your deliberations.

While this may seem strange coming from the bar, our other concern with S. 1080 is that some of its provisions offer too much opportunity for needless litigation. In general, too many issues these days are left to the resolution of courts -- a resolution inevitably delayed and for that reason (as well as by reason of the resources that must be employed) costly to the nation's economy. This legislation should not be permitted to become merely a vehicle for increasing the quantum of litigation where there are other means of attaining a goal of the bill. As you will see, that view of the role of courts underlies many of our conclusions about the President's role.

Regulatory reform legislation, so strongly needed, should accomplish a number of interrelated objectives. It should lead to regulation that:

- is cost-beneficial and cost-efficient to the public affected by it, avoiding both excess and waste;
- promotes the government's acting with reasonable coordination, efficiency and dispatch;
- results from a process which appropriately recognizes the interests of all affected to participate in it;
- is subject to effective political oversight, in the Congress and at the White House, to assure accomplishment of national economic policy objectives; and
- is subject to effective judicial oversight to assure compliance with law.

Achieving so complex a set of objectives requires carefully tuned measures, measures which guard carefully against insufficient bureaucratic attention but also against excessive procedures. The need for tuning can be illustrated by the proposed statutory requirement of regulatory impact analysis for major rulemakings, a measure which we generally favor.

We believe regulatory impact analyses will improve rulemaking outcomes by assuring that agency decisionmakers carefully consider the potential impacts of their actions on the economy and evaluate realistic alternatives. At the same time, experience under the National Environmental Policy Act has shown that the process of making analyses can also have its cost and risk. For example, the time such procedures require for a decision adds new delay. The cost of that delay looms particularly large in inflationary times. For another example, if regulatory analyses are repetitively done, or performed defensively rather than with genuine commitment to use of the results, such analyses degenerate into rote exercises. That is a risk. For these reasons, we agree with S. 1080 and E.O. 12291 that use of the impact analysis device should be limited to the most important occasions, when its contribution will be evident. The concept of major rule seems appropriate to us for this purpose.

Similarly, the role of participants in the process must be carefully analyzed, to assure needed participation without providing opportunities to engender unwarranted delay. The ability of participants to contribute information and views to the agency during its decisionmaking is essential. Their ability to obtain after-the-fact judicial review of procedural compliance, on the other hand, has proved a mixed blessing under NEPA and might have similar effect if the procedure and substance of regulatory impact analysis were subjected to judicial review. Against the benefits that come from judicially enforced compliance with statutory procedures must be set the costs of often substantial delay, inordinately complex review proceedings, and a bureaucracy made overcautious by that potential. In this latter respect, remember that in most rule-making proceedings, including those that are aimed at increasing productivity in the economy, there will likely be some participant who would be motivated to challenge the result. The right to review provides that opportunity. Congress recognized this problem last year in enacting the Regulatory Flexibility Act, which makes the reg-flex analysis nonreviewable.

In our judgment, placing enforcement of the "major rule" definition and the cost-benefit/cost-effectiveness analysis requirement in judicial hands at this stage would add to the complexity and rigidity of the statutory scheme without compensating benefits. We are at an early stage in the development of these tools. Definitions of cost and benefit for this purpose, and their understanding by regulator and regulated, are correspondingly general. This does not mean these concepts are not valid. To the contrary, they are vitally important and are too little considered in regulatory actions. They should be required. But the methodologies of their application are still being developed. At such a time, oversight should be prompt and managerial in nature. Giving such issues to the courts will only invite uncertainty in those who are regulated, paralysis in those who are regulating or deregulating, and delay for both.

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Basic to the bill's requirement for preparation of regulatory impact analyses is the definition of a "major rule" contained in proposed section 551(16). We appreciate the difficulties inherent in the definitional task and thus understand the use of such terms as "substantial" and "significant" in subparagraphs ii and iii. Perhaps there is no more precise terminology which will achieve the drafters' purposes. Even the precise $100 million in cost (including "indirect cost") in subparagraph i is less than a hard line, since the measurement and standard for measurement of such cost is difficult. If an agency determines under section 553(c)(1)(G) that a proposed rule will not cause or is not likely to cause the stated "substantial" or "significant" or $100 million consequence, is that administrative decision, having the result of a regulatory analysis not being conducted, subject to review and reversal by a reviewing court? The present language might support an affirmative answer.

Proposed section 553(f)(3) states that a rule shall not be held unlawful or set aside because of "an inadequacy in the [regulatory analysis] statement . . . unless the court finds . . . that such inadequacy . . . renders the rule unlawful under section 706(a)(2)(A) (B) or

(C). . . ." Thus, the drafters' intent appears to be that subsection (D) of section 706(a)(2)--"without observance of procedure required by law"--shall not be applicable to review of the adequacy of a regulatory impact statement and that a major rule shall not be held unlawful or set aside unless the inadequacy of the analysis "renders" the rule, we assume substantively, "arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." Procedural errors in carrying out a regulatory analysis, in and of themselves, thus are not reviewable. But what sort of inadequacies of the statement can cause the rule to be arbitrary or capricious? What if no analysis is given? A possible, perhaps intended, reading of the bill is that a statement showing a perfunctory or virtually no analysis where one is required results in the rule's being capricious.

The result of the foregoing would be to lodge in courts the duty to construe terms such as "substantial", "significant", "indirect cost", etc., both in the major rule determination trigger and in the regulatory analysis content. This introduces major elements of uncertainty and consequent potentiality for undesirable delay. We believe this is a provision that deserves at least further consideration.

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It might be thought undesirable to give agencies the unreviewable power to fail completely to engage in the kind of analysis and decisionmaking mandated by the bill. Our suggested resolution of this problem is to make the agency's decision that a rule is or is not major unreviewable by the courts but to provide that the President or his delegate has authority to require an agency to designate a proposed rule as major and thus to require the agency to engage in the mandated analysis and mode of decisionmaking. This is the effect of Executive Order 12291 as we read it with respect to Executive Branch agencies.

Putting enforcement of the bill's procedures in the hands of the President under the general oversight of the Congress seems to us, on balance, to be the desirable course. We believe Congress has signified its own appreciation for the wisdom of this course in the Paperwork Reduction Act passed just last year. Presidential oversight can occur in real time, as decisions are made, not years after, and should be capable of producing timely, efficient decisionmaking. It would also maximize the prospect of an important element of regulation reform, the coordination of economic policies and goals within the whole Government by permitting interagency review under presidential auspices. It is also more likely to produce an engaged bureaucratic commitment to the success of the procedures. These prospects are all enhanced in a situation, such as exists, when the Administration is deeply committed and firmly organized to monitor and enforce the objectives of regulatory reform.

It may be, in time, that the meaning and methodology for analysis of costs and benefits will become sufficiently fixed that judicial review would be appropriate. But, in our judgment, that time is not yet.

In short, the ABA supports a requirement of regulatory impact analysis, but as a tool of regulatory management rather than as a source of legal right. We do not think that the choice between the courts and the President as the agent of oversight can be deferred. Accordingly, we urge affirmative provision for Presidential oversight, and we oppose judicial review of the agencies' performance of this new function. We do believe, however, that any analysis which is performed should be made part of the materials available to a court on review of the rule itself.

The language developed in S. 262 last year after extensive discussion and consultation, and which is substantially reflected this year in H.R. 746, serves both these purposes. We think this approach is far preferable to that of proposed section 553(f)(3) of S. 1080 as it applies to regulatory analyses.

In any event, we also believe that great care should be taken not to appear to restrict, limit or conflict with the operation of Executive Order 12291 with respect to Executive Branch agencies. Indeed, the leanest approach would be for the bill simply to express Congress' approval of the extension of the Executive Order to the independent agencies, with an obligation on the part of the President to report periodically to Congress on his administration of the Order. If the bill's approach on regulatory analyses is adopted, given its detailed requirements, we would urge inclusion of both a savings provision with respect to the President's constitutional authority over Executive Branch agencies and an affirmative provision for the President's oversight of the regulatory analysis provisions generally.

Because of the need we perceive for presidential involvement and for other reasons, we would strongly prefer to see the regulatory analysis provisions relocated. S. 1080 presently builds them into section 553 of the Administrative Procedure Act - which has no other presidential involvement. We believe they should be moved to a separate chapter of the APA, as has been done with the regulatory review and regulatory agenda provisions of S. 1080. Another reason for this move is that one of the virtues of section 553 is that it has been a purely procedural provision for rulemaking. The regulatory analysis provisions, on the other hand, impose standards that go beyond purely procedure, and impose standards for decision-making. While we are in agreement with those standards, we have reservations about mixing them into what has heretofore been a purely procedural section of the Act. Section 553 is relatively uncluttered and has worked well over the years for the bulk of rulemakings, which are not major rules and which have not involved factual issues of central importance. I might point out that all the bills in the prior Congress put the regulatory analysis provisions in a separate chapter. We do not see that it adds any benefit to put them in section 553 and as a drafting matter see the detriments I have mentioned.

Obviously, the courts, the President and the Congress each have a significant role to play in reforming and controlling regulatory government. The legislative challenge is to craft roles which maximize the contribution each can appropriately make -- both to controlling unwanted and wasteful excesses of government, and to assuring the smooth and efficient functioning of government in those circumstances in which regulation is warranted.

Court's Role. While we do not wish to see any undue expansion of the court's role in regulatory review, we do hope there can be a refinement of it. The ABA supports the proposed amendments to Section 706 of the Administrative Procedure Act, first developed by Senator Bumpers, and the proposed definition of a rulemaking file. Both measures will usefully structure the judicial function.

Under current law, the courts have occasionally felt constrained to accept adventurous administrative readings of governing statutes even absent a clear legislative indication that so much authority was intended. They have been hampered in reviewing rulemakings by the absence of a legislative definition of either the materials appropriate to consider or the relationship the agency must be able to show between those materials and its factual conclusions. By appropriately stressing the independent judgment Congress expects courts to bring to the resolution of legal issues and, in particular, the need that agency authority be justified in terms of legislative language and history, the proposed amendments to Section 706 will help assure that government exercises no more authority over citizens than Congress commands. By defining the rulemaking file and then instructing that rules must find substantial support there, the proposals workably define, in general terms, what has been a troubling question for courts in the absence of statutory guidance.

As we have already suggested, however, excessive judicialization of administrative processes can be obstructive of the ends of regulatory reform. Judges tend to find the procedural model of rulemaking less comfortable and familiar than the processes of formal trial. Left to their own devices, courts may naturally tend to interpret rulemakings as if they were trials in some sense, and import as requirements formal procedures the Congress itself might not choose. Anticipating the possible frustration of reversals on procedural grounds long after their decisions have been reached, rulemakers clog their proceedings with formalities which add little to the correctness of substantive outcomes but engender substantial expense and delay.

We believe this problem may be involved in the question of "hybrid" rulemaking procedures, to which you have specifically directed my attention, and the special judicial review provisions with respect to it in S. 1080. I have some difficulty addressing it more fully, as the matter is somewhat technical and the ABA has not adopted a position which would authorize me to urge approval or disapproval.

I do note that the provision in S. 1080 is limited to major rules. Its application should be clearly limited in some fashion, because there are many rulemakings when oral presentation and opportunity for cross-examination would unduly formalize and delay the process. But I am not sure that major-minor is the right line for this purpose, especially given the inherent difficulty of marking with a bright line when a rule becomes major.

The requirement of an opportunity for cross-examination presents the issue of whether the advantages of cross-examination outweigh the costs. The bill requires opportunity for cross-examination "only" for the resolution of "material facts" and when "other available procedures" are determined (we assume by the agency) to be inadequate. The bill then provides that the reviewing court shall not hold unlawful or set aside an agency rule because of "a failure by the agency to afford an opportunity for cross-examination . . . unless the court finds . . . that such . . . failure renders the rule unlawful" because it is (A) arbitrary, capricious, or an abuse of discretion or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege or immunity; or (C) in excess of statutory jurisdiction, authority, or limitation, or short or statutory right.

We do not understand how this unique provision will be construed by a court. It is markedly different from provisions with ostensibly the same objective in the version of S. 262 approved by the Judiciary Committee in the last session of Congress and also from the solution legislated by section 305 of the Clean Air Act Amendments of 1977. We are unsure whether S. 1080's special judicial review provision for cross-examination in rule-making is intended to reach a result different from that of S. 262 or the Clear Air Act. I believe that deserves close attention.

Role of Congress. Congress, too, has important oversight roles to play. The ABA is strongly supportive of clear guidance from the Congress, in the first instance, as to what policies it intends agencies to pursue; careful choice among regulatory techniques which might be effective to achieve those ends; continual oversight, through the budgetary process and otherwise, of the general success of agencies in achieving their statutory ends; and periodic review of important agency authorizations to assure that they remain needed and adequate for the public good. In particular, we support the idea of periodic review of existing regulatory law as a welcome and necessary self-discipline -- both for individual agencies, through a regulatory review or reauthorization process, and for Congress, through some form of sunset law.

On the issue of sunset legislation, we believe it fair to question Congress', or indeed anyone's, capacity to handle in a meaningful way the proposals some have made for automatic review of all agencies on a scheduled basis, with lapse of authorization as the necessary consequence if reviews are not completed in timely fashion. We doubt the realism of any schedule going out ten years and covering the whole regulatory apparatus. More realistic would be a congressional program for reexamination at any one time of a limited number of particular important agencies or regulatory programs, with appropriate deadlines for committee action and assurance of floor vote. A significant question we see in sunset legislation is how and when to make the selection of which agencies or programs are to be reviewed at any point in time. We do believe the Executive Branch should have some role or input in that selection.

We are pleased to find that legislative veto provisions have been omitted from S. 1080. We respectfully submit that Congress' institutional strengths and limited resources would counsel against adoption of any general legislative veto provision, even if the much-discussed constitutional issues were clear. It is difficult to see how Congress can meaningfully attend to individual regulatory decisions. As Thomas Jefferson long ago remarked, "Nothing is so embarrassing nor so mischievous in a great assembly as the details of execution." The Congress as a whole can hardly act other than by general policy pronouncements, or legislation. Even individual committees, which become expert through their oversight functions, seem more geared to assessing general policy positions and program results than to reviewing the results of particular decisions. To make all rules subject to possible veto will add months to the time necessary for adoption of rules, including I might point out deregulatory rules, without often changing results. It will also likely add substantially to the distractions from traditional legislative work and programmatic oversight by congressional committees. It may also put a premium on types of lobbying effort and increased Congressional staff size with which Congress may prefer not to be burdened.

As we have argued before, a legislative veto destroys the rule as promulgated, puts nothing in its place and leaves the agency in a quandary as to what if anything it should do next to fulfill its statutory mandate.

A veto rejects, it does not balance. The ABA Commission on Law and the Economy felt that the central task of modern democratic government -- "to make wise balancing choices among courses of action that pursue one or more conflicting and competing [governmental] objectives" -- is a prime need to be met. The legislative veto -- even the constitutionally more palatable approach of Senator Levin's bill, S. 344 -- does not really deal with this central task.

In opposing legislative veto, we wish to be clear that we support strong legislative oversight as an essential component of regulatory reform. That oversight will be most effective, however, when turned to careful limitation of agency authority in the substantive statutes; periodic review of that authority; oversight of the general administration and policy directions of particular agencies through budgetary and legislative hearings; and, especially, continuing congressional oversight and support of the Executive's effort to introduce elements of coordination and national policy direction into the work of regulation. Indeed, the last is perhaps the most important point, and brings me to the last subject of my remarks today.

Coordination with National Economic Policy. The ABA's Commission on Law and the Economy saw three general characteristics of regulatory agencies as responsible for a basic defect of the American regulatory system. That defect is the inability of regulatory government to make wise balancing choices among courses of action available to pursue one or more of the many conflicting and competing objectives established by national legislation -- the inability of individual agencies effectively to coordinate. The three characteristics responsible for this defect are, first, the mutual independence of agencies one from another; second, the single-mindedness of individual agencies in pursuing particular statutory policies assigned to their charge without regard to, or capacity to implement, other policies of a more general or over-arching character; and, finally, the multiplicity of agencies and programs generated in a complex society, many often sharing responsibility for pieces of a particular policy issue. These characteristics have been adverted to by you, Mr. Chairman, in your floor statement in connection with S. 1080.

We concluded that only the President is logically placed and enjoys the institutional capacity to overcome these characteristics -- and at the same time to reintroduce an element of coordination and political accountability for executive government. This is clearly in the contemplation of our constitutional scheme but has been missing so far in regulatory government except to the extent the Executive Orders (No. 11821 in 1974, No. 12044 in 1978, and No. 12291 in 1981), in increasing scope, seek to achieve it. The

Executive Order impresses us as a relatively mild form of Presidential oversight.

We welcome President Reagan's Executive Order 12291, which puts into place requirements of regulatory impact analysis and coordination within the Executive Branch agencies for major rulemakings. We consider it a sound measure, one which builds on prior experience under its predecessors, substantially improving their terms. Well founded as a procedure for assuring coordination of governmental activity, agency implementation within law of the President's program, and thorough consideration of important issues arising in execution of the laws, the Order draws on the Constitution's explicit grant to the Chief Executive of authority to "require the Opinion, in writing, of the principal Officer in each of the Executive Departments, upon any subject relating to the Duties of their respective offices." Its validity is a necessary implication of the constitutional drafters' fundamental choice to put all executive government under the supervision of one politically responsible figure. And our impression is that it has already improved agency decisional outcomes.

Concerning S. 1080, our proposal for presidential involvement with respect to independent agencies is similarly mild. The President could not command an agency to do anything more or less than its regulatory statute provides, but only cause the agency to perform the cost-benefit and cost-effectiveness analysis in appropriate cases, in an appropriate manner and on a coordinated basis with the rest of the government. As you know, Mr. Chairman, the Association would support a larger step than we are suggesting here toward presidential oversight over regulatory government. We believe that even greater presidential authority is needed, subject to appropriate Congressional checks, but we recognize that such a development must await future consideration, perhaps in the forum of a Hoover-like commission, and legislation by the Congress.

I hope this discussion has been useful to you. There are many more things of course that could be said. We plan to give somewhat more detailed comments on S. 1080 to Senator Laxalt's Subcommittee later this week and will make those comments available to you if you wish. I would also be happy to respond to any questions that you might have, and thank you for your attention.

MR. SMITH'S RESPONSE TO WRITTEN QUESTION SUBMITTED BY SENATOR EAGLETON

Question. Your testimony repeatedly sounds the theme that someone must oversee agency compliance with regulatory analysis requirements. You make it clear you prefer having the President, not the courts, exercise this authority.

I certainly share your concern that protracted litigation over such questions as whether a rule is "major" or an analysis is adequate could aggravate an already delay-ridden, expensive regulatory process. However, one of the merits of testing agency compliance in a court of law is that the issues in dispute and the identities of the disputants are matters of public record.

In comparison, executive branch oversight can be conducted in relative obscurity, and the access afforded to various interested parties can depend on factors completely unrelated to the merits of their arguments. A related problem with oversight by the President (or, more likely, his lower level designees) is that substantive disagreements with regulatory policies set by Congress can more easily be masked as matters of "procedural" review.

In light of these considerations, would you agree as a general matter that the grant of oversight responsibility to the President should be accompanied by some kind of procedures for holding the President accountable? Do you have any specific recommendations (e.g., would you support a requirement that the President publicly disclose the basis for his determination that agencies are not in compliance)?

Answer. I do agree with you as a general matter that the President's exercise of oversight should be accompanied by "some kind of procedures for holding the President accountable." What those procedures should be, in the judgment of the Bar Association, turns on the specific function being exercised. In general, however, our view is that the oversight exercised should be political in character, performed by the people or the Congress, rather than performed through the courts.

More specifically, the Bar has distinguished between oversight of the President's own supervision of agency functions in a procedural or management sense, and oversight of presidential action which would direct the performance of specific regulatory measures. In the former setting—a good example is provided by the Paperwork Reduction Act enacted by the last Congress--the strategy of oversight is not to correct individual actions by the President but to assure as a general matter that his actions are themselves taken with an eye to effective management and coordination of government activity rather than decision in the individual case. In our judgment, the President should and would be aware that a congressional conclusion that he had often used a management tool to force his substantive judgments on agencies would lead to prompt revision of the statutes. Historically, this has been the result. The Federal Reports Act was amended to reduce OMB's oversight functions over paperwork requirements when Congress concluded it had been acting abusively; the Paperwork Reduction Act recently restored that authority in apparent confidence that the distinction between management oversight and substitution of judgment would not be observed.

The Paperwork Reduction Act contains a provision requiring the Director of OMB to make public both the fact of and his reasons for any decision to disapprove a proposed information requirement, if the proposal is made in rulemaking (Sec. 3504(h)6)) but apparently not otherwise. All such actions are to be reported to Congress; none are subject to judicial review. We believe an analogous regime would be acceptable and workable here. Once a rule has been proposed, but not during earlier and less formal stages, it could be required that presidential disapprovals of agency effort be expressed in writing. It would also be possible to provide that any written memoranda passing between the White House and the agency would become part of a rulemaking file.

We believe it would be a mistake, however, to require oral as well as written communications to be publicly made. While the risk of abuse is undeniable—as is also the case for informal interventions by Congressmen and their staff—one must at some point rely upon the integrity of the one executive official who is replaceable through the electoral process. Noting every telephone call, much less recording its substance, could turn a useful management technique into a paperwork monster. The fact of important meetings or discussions might be noted, but even here the importance of preserving full and frank exchange counsels strongly against requiring that the substance of the discussion be exposed. Congress' proper concern, in our judgment, is with systematic abuse rather than individual error in this context, and we believe that can be achieved without an elaborate oversight scheme. In particular, we strongly oppose any form of judicial oversight.

Were the Congress to authorize presidential action explicitly directing an agency's exercise of substantive judgment—as the Bar believes it should for the decision of a limited number of critical regulatory issues—more pointed oversight would be warranted. In proposing such a measure in Recommendation 3 of its study "Federal Regulation: Roads to Reform," the Bar's Commission on Law and the Economy concluded that the President should be authorized to act only on public notice, with an opportunity to comment, a public record of outsider presentations, adherence to agency procedural and substantive limits, a public explanation of the action, a "cooling off period" to permit Congressional response, and judicial review of the decision as if it were the agency's. The difference between this rigorous oversight and the more limited regimes discussed above lies precisely in the element of substitution of judgment. In fact no President could often afford to substitute his judgment for that of a responsible agency; the President must, however, be able to manage the affairs of government, and in a manner not unduly constrained by procedural formalities. In our judgment the distinction will be well understood by the President, as well as by Congress, by the agencies and by the public. While we agree that "some kind of procedures" are appropriate for enforcing its observance, we believe they need not and should not be elaborate or formal.

Chairman ROTH. The committee is in recess subject to the call of the Chair.

[Whereupon. at 12:50 p.m., the committee was recessed, to reconvene subject to the call of the Chair.]

REGULATORY REFORM LEGISLATION OF 1981

TUESDAY, JUNE 23, 1981

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, D. C.

The committee met at 10:13 a.m., in room 3302, Dirksen Senate Office Building, Hon. Warren Rudman presiding.

Present: Senators Rudman, Percy, Eagleton and Levin.

Senator RUDMAN. We will call the committee to order this morning. We are here this morning to hear testimony on the Regulatory Reform Act of 1981, which is S. 1080. Our first witness this morning will be Senator Harrison Schmitt of New Mexico, who will be on very, very shortly. While we are waiting for his arrival, I would like to instruct the clerk to enter into the record at this time the statement of the chairman of our committee, Senator Roth of Delaware.

[The opening statement of Senator Roth follows:]

OPENING STATEMENT OF SENATOR ROTH

Today, the Governmental Affairs Committee will hear important testimony from the General Accounting Office about the problems of regulatory conflict and the costs to agencies of preparing detailed regulatory analysis on all new major rules. While an urgent meeting at the White House prevents me from attending this hearing, I will carefully review this testimony and am certain that this information will receive careful attention from the governmental affairs committee in the coming weeks as we move toward mark-up of regulatory reform legislation.

When I requested that GAO analyze the costs to agencies of preparing a cost-benefit analysis two months ago, I did so with the realization that no solid data on these costs had ever been compiled. The figures provided by GAO (an average cost of $128,000 per analysis, see p. A-9) are not inordinately high, but they do indicate that a substantial commitment of limited agencies resources will be required. In addition, GAO was not able to give any clear indication of the delay which will result from these cost benefit requirements. This is an issue which may be even more important than cost. The role of consultants in preparing these analyses is also important and must be given careful consideration by the Congress.

The use of cost-benefit analysis in the regulatory process requires a careful balancing of various goals and interests. We must do all we can to facilitate the goals of existing legislative goals, such as environmental protection, consumer product safety and worker health while at the same time reducing the excessive cost of regulatory compliance to the economy. There is a need for better management of the regulatory process, which cost benefit analysis can promote, but we must ensure that improving the management of regulatory programs does not seriously damage necessary regulatory goals.

The issue of cost-benefit analysis is made even more timely by the recent decision of the Supreme Court in the cotton dust case (*American Textile Manufacturers Institute, Inc.*, v. *Donovan*, No. 79-1429). If that decision is read by Federal courts as prohibiting a cost benefit analysis except where expressly mandated by statute, the regulatory relief program of the Reagan administration could be jeopardized. Substantial portions of the Reagan Executive order on regulatory relief (E.O. 12291) may conflict with this decision. Legislation like S. 1080 may be necessary if the administration's task force on regulatory relief, chaired by Vice President Bush, is to continue functioning.

GAO will also make public at these hearings an extensive report which they have prepared on the problem of regulatory conflict and overlap. While GAO found that such overlap is not as serious a problem as many had believed, the report also recognizes the important role played by the Office of Management and Budget and the President in resolving such conflicts. The President's program of regulatory relief and improved regulatory management undertaken pursuant to Executive Order 12291 has been important in resolving many of these conflicts and overlaps and should be continued and even strengthened. Only by assuring that the highest ranking elected official in our Government has adequate authority over regulatory policy can we promote consistency, efficiency and accountability in the regulatory system.

My Committee on Governmental Affairs is charged with overseeing all operations of the Government to ensure that they are operated as efficiently s possible. Regulatory analysis, while an important tool in our efforts to reduce the burden of regulation is like any other program. It too must be run economically and without waste. It makes little sense to create a new paperwork mill in our efforts to reduce the paperwork and redtape of the regulatory process.

Senator RUDMAN. I would like to say to all of the witnesses here this morning that we have your prepared statements and they will be incorporated in full in the record. We would simply ask that you summarize your statements, if you wish, or you may give them in full, if you wish.

But in the interest of time, if you would summarize them, they would be printed in their entirety in the record.

I turn to my colleague, Senator Levin, for any opening statement which he wishes to make at this time.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Thank you very much, Mr. Chairman. This is the continuation of an important series of hearings on regulatory reform. There are a number of issues, some of which have been highlighted by a recent Supreme Court opinion. In the recent opinion of the Court in the cotton dust matter, the Court found that the statute in question does not require that a cost-benefit analysis be made. The statute in that case, the Court found, did not have any such provision, and the Court also found that the agency was correct in proceeding without a cost-benefit analysis given the legislative history of the statute that OSHA was interpreting.

One of the questions which that opinion sharpens for us is whether or not the Regulatory Reform Act of 1981, Senate bill 1080, which is before us, is intended to overturn substantive law, whether or not a lack of a requirement for such an analysis in existing or future substantive law is intended to be changed or overturned by the bill in front of us. I think in light of the court opinion, that question takes on added significance. There are a number of other issues which I hope we can address this morning with greater emphasis than we have in the past, one of them being whether or not the Office of Management and Budget, which is given now such an important role in the regulatory process, is obligated to make known to the public actions that it takes on proposed regulations.

We have a requirement now that an agency must forward to OMB a rule or regulation for its comment, and OMB has the right to veto that regulation, in fact, before it is even published. The question is whether or not we are going to require some kind of public notice of that role of the OMB since it is going to have and now has such a critical position and since its impact is going to be so critical on the regulation in question.

Finally, Mr. Chairman I would like to point out that we are honored this morning to have Senator Schmitt with us who is going to be testifying on questions involved in legislative veto.

Senator Schmitt has been a leader in this movement. I think the Senate, Congress and the country is indebted to him for the role that he has played. There are a number of alternatives which are being offered for legislative veto, the Schmitt approach and the so-called Levin-Boren approach of which I am the author, along with Senator Boren. Indeed there is another approach Senator Byrd is offering which is a third option, a third road to Jerusalem.

The differences between these approaches have been highlighted in previous testimony. They were analyzed, reanalyzed, hashed over and rehashed over in terms of differences between a one and a half-House veto, two-House veto, a two-House veto, with the President. There are other differences in these bills in terms of how many regulations will be covered, in terms of whether or not there should be a delay mechanism which is triggered by a committee or whether or not all regulations should be delayed, and other differences.

The point this morning is we have with us Senator Schmitt, who is going to be testifying in terms of the general need for such a mechanism. Whether or not one supports the one and a half, two veto or two House with the President approach, I do think there is more that unifies these approaches that there is that separates these approaches. That is an important factor to remember as we look at these alternative proposals, that they have a common purpose and that purpose is to build some accountability into the regulatory process, and Senator Schmitt has been an eloquent witness for that common purpose.

Whichever approach we finally adopt, whatever mix we finally adopt, it is critical that this Congress at long last on an across-the-board basis adopt a legislative veto mechanism so we can again make these agencies accountable to the public, to their elected officials. Thank you, Mr. Chairman.

Senator RUDMAN. Thank you, Senator Levin. Our first witness this morning is the, Senator from New Mexico, Harrison Schmitt. Welcome. We are glad to have you with us this morning.

TESTIMONY OF HON. HARRISON SCHMITT, U.S. SENATOR FROM THE STATE OF NEW MEXICO

Senator SCHMITT. Thank you, Mr. Chairman. I appreciate this additional oppotunity to dicuss with you and others the question of the legislative veto, basically a concept under which in one form or another, the Congress would have the authority at the end of the rulemaking pipeline to disapprove a proposed rule put forth by the executive branch or by an independent agency.

In particular this morning, I would like to, after submitting my entire statement for the record, if I may, Mr. Chairman, review our experiences with legislative veto in four areas.

Executive reorganization, impoundment, Federal salaries and regulations issued by the Federal Election Commission. These legislative vetoes have been in place for years. In the case of executive reorganization, we can reassure the record in terms of decades, a half-century, in fact. I believe the record of these four legislative vetoes mechanisms provides convincing evidence that the legislative veto is a satisfactory instrument of governmental activity for both branches of Government, legislative as well as the executive.

The executive benefits by receiving broader delegations of power. Congress benefits by retaining a check and a balance on excessive executive action.

The story we have seen over the last half-century is one of mutual accommodation and adjustment, where legislative powers are shared between the executive and legislative branches. Mr. Chairman, if there is one theme in my arguments, it is that this sharing of legislative power that we have agreed to within our system of government under the Constitution requires the Congress to maintain continued vigilance over the exercise of that shared power.

First of all, Mr. Chairman, the one-House veto attached to reorganization authority is a classic case of accommodation between the executive and legislative branches. Starting with Herbert Hoover, Presidents have asked Congress for authority to reorganize the executive branch subject to legislative review and disapproval within a specified number of days. The history of this process shows that it originated because of a Presidential request, not congressional encroachment of any kind.

From 1939 through 1980, there have been 116 reorganization plans submitted by Presidents. Twenty-three plans have been disapproved by the legislative veto, most of them by the one-House veto. Every President since Hoover has appealed to Congress to continue exercising this authority despite the existence of a legislative veto in these various acts.

Beginning in 1949, various high officials of the Department of Justice have prepared arguments to justify, I repeat, to justify the legislative veto in a reorganization act. Attorney General Griffin Bell, in a letter to President Jimmy Carter, on January 31, 1977, concluded the legislative veto attached to reorganization authority is constitutionally valid.

Second, Mr. Chairman, the issue of impoundment. Over the course of almost two centuries of our history, Presidents have exercised a form of "item veto" by refusing to spend certain funds appropriated by Congress. Often this was in the interest of savings and economy representing the routine withholding of funds that did not challenge the right of Congress to determine national priorities.

When funds were deliberately withheld to thwart congressional spending decisions, we gave birth to the term "impoundment." After a particularly tense confrontation between President Nixon and Congress in 1972 over a spending ceiling, and after dozens of cases in the Federal courts, Congress passed legislation in 1974 to regularize the withholding of such funds. The Impoundment Control Act recognizes two types of impoundments; temporary, that is deferral, and permanent, that is recision. In the case of deferrals, either House of Congress may pass a simple resolution at any time disapproving the deferral at which point the funds must be released by the administration for obligation by the agencies.

The one-House veto over deferrals has been a routine measure in the House and Senate. Congress disapproved 16 deferrals in 1975 and 24 in 1976. The number in subsequent years declined becase of the position of the Carter administraion in generally accepting the budgetary priorities established by the Congress through appropriations bills.

Beginning with the Reagan administration, however, the impoundment procedure has been used vigorously in an attempt to curb spending during fiscal 1981.

Obviously, there has been an accommodation between the Congress and the President with a legislative veto playing the neccssary link in that accommodation.

Third, Mr. Chairman, the question of Federal salaries. I think it is in the Federal salary issue that we see some of the most important considerations relative to legislative veto. Prior to the establishment of the salary commission system in 1967, Federal salaries for top officials were determined by periodic adjustments by Congress. Under the Federal Salary Act of 1967, salary adjustments became subject to Presidential proposals every 4 years based on recommendations of a quadrennial Commission on Executive, Legislative, and Judicial Salaries.

The President's recommendations would take effect in 30 days unless one or both Houses voted to disapprove the proposals. Adoption of a simple resolution of either chamber was enough to negate the President's recommendations.

Salaries are also subject to annual recommendations of the President under the Executive Salaries Cost-of-Living Adjustment Act of 1975. Presidential pay recommendations take effect within 30 days unless either House votes disapproval.

In 1974, after the President recommended pay adjustments based on the second quadrennial Commission, the Senate adopted a resolution of disapproval. The Congress also attached amendments to appropriations acts to prohibit the use of Federal funds to implement the President's pay adjustments for top level officials, another form of veto, if you will.

In 1977, the U.S. Court of Claims upheld the constitutionality of the one-House veto in the Federal Salary Act. The case of *Atkins* v. *United States* was brought by 140 Federal Judges who sued the Government to recover compensation for their services.

Among other claims, they argued the Senate resolutions in 1974 disapproving the President's pay recommendation was an unlawful and unconstitutional exercise of executive power reserved to the President.

Moreover, they said that the Senate resolution did not constitute the enactment of legislation in accordance with requirements of article I, section 7 of the Constitution providing for the presentation of bills and resolutions to the President for his signature or veto. The Court of Claims concluded that the one-House veto in the Federal Salary Act was an appropriate exercise of congressional authority under necessary and proper clause of article I.

That part of the Constitution, said the court, "authorizes Congress to choose first to delegate the initial power to make proposals to the President and then to select for itself if appropriate method of checking and monitoring the President's action."

Quoting from a landmark case of *McCulloch* v. *Maryland* in 1819 the Court said the necessary and proper clause authorizes Congress "to exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the Government," and to "avail itself of experience, to exercise its reason and to accommodate its legislation to circumstances."

The decision by the Court of Claims was confined to the specific mechanism in the Federal Salary Act. The one-House veto related only to the matter of salaries which the Court said was "traditionally within the particular province of the legislative branch."

However, Mr. Chairman, I think the reasoning of the Court of claims allows us to reach a more general understanding about legislative veto. What I find interesting about this decision is the fact that the Court of Claims recognized that the Senate resolution was not an act of lawmaking. By disapproving the President's recommendation, the Senate preserved the legal status quo.

The President's recommendation was not law. It merely had as the court said the "potentiality of becoming a law." It is, therefore, a misconception to say that the one-House veto is an invalid form of lawmaking or that it invades administrative powers of the President.

Quoting again from the Court of Claims, "When a single House negates the President's recommendations, as the Senate did by Senate Resolution 293, precisely the same result is reached as if one House voted down a proposal for new legislation. There is no change in the law."

In 1977, Congress changed the procedure for voting on the Federal salary recommendation submitted every 4 years by the President. Instead of a one-House veto, each House is required to conduct a separate vote on each of the pay recommendations for the three branches. The statute, Public Law 95–19, provides each House approve or disapprove by rollcall vote the recommendations for each category. If both Houses approve, the recommendations take effect.

On March 12 of this year, Mr. Chairman, the House of Representatives adopted a sense of the House resolution that the approval of pay recommendations by President Carter "would be inappropriate at this time." This action conformed with the position announced by President Reagan through his Budget Director, David Stockman. On that same day the Senate adopted a series of resolutions disapproving the pay recommendations of President Carter.

Finally, Mr. Chairman, the issue of FEC regulations. My prepared testimony discusses this in detail. Suffice it to say in 1971, Congress passed legislation to supervise campaign finance laws. The clerk of the House was responsible for overseeing House elections, the secretary of the Senate for Senate elections and the Comptroller General for Presidential elections. To improve the supervision, Congress established the Federal Election Commission in 1975 to monitor the application of the new campaign finance laws.

In 1975, on two occasions, Congress vetoed regulations proposed by the FEC. The membership of the Commission was declared invalid by the Supreme Court in 1976, in *Buckley* v. *Valeo,* and for a time the Commission ceased to operate.

Legislation in 1976 reconstituted the Commission, taking from Congress its previous authority to appoint some of the members of the Commission. In 1979, Congress exercised its veto power by diapproving a proposed FEC regulation.

The legislative history supports the need for legislative veto. As noted by the Committee on House Administration in 1974, "no legislation purporting to regulate election campaign activities can be drawn to fully anticipate every contingency." Each campaign is unique.

On July 31, 1975, the Commission sent to Congress for review its first proposed regulation—to treat Members' office accounts as campaign funds subject to the limitations on contributions and expenditures under the new campaign finance law. After initial criticism, the Commission submitted a revised regulation on September 30. The Senate Rules Committee concluded that both versions were unacceptable because they discriminated against encumbent Members of Congress. The Senate disapproved the regulation. The Commission issued a new regulation, taking into account the criticism directed at its previous efforts, but shortly thereafter the Supreme Court handed down its decision in *Buckley* v. *Valeo.*

At about the same time that the Senate defeated the office accounts regulation, the House of Representatives disapproved another FEC regulation which stipulated that candidates must first file their campaign finance reports with the FEC before copies would be made available to Congress—the point of entry regulation.

Mr. Chairman, I bring these points to your attention to show you that in the FEC case, we have a very clear analogy to the proposals that I and others have made for legislative veto for all Federal agencies. In fact, last year the Senate and House and the President both agreed to legislative veto as applied to the Federal Trade Commission along the lines that I have been advocating here today.

Mr. Chairman. I have reviewed the record of these four legislative veto concepts to underscore the workability of this procedure, a question that has often been raised, but it clearly is a concept that works. Congress has conscientiously selected a mechanism that appropriately balances the need for executive initiative with the requirement for congressional review and responsibility for those laws that are made. Both branches recognize the need for broad delegations of power to permit adaptation to changing and unpredictable circumstances. The legislative veto remains an essential check for controlling delegated power.

Mr. Chairman, on March 24, I testified before the House Judiciary Committee on the legislative veto, and I would ask that that testimony be included in your record at the conclusion of my remarks, and in that you will see reference to important court cases in this area of law.

In summary of that statement and those cases, I think the clear import is that the nature of lawmaking does not change once there has been a valid delegation of authority to an agency. If Congress had not enacted the Administrative Procedures Act, agencies would be free to administratively legislate in the same manner that Congress makes law. Conversely, Congress can and has legislated general minimal procedure requirement for rulemaking in Administrative Procedures Act and more specifically detailed requirements with regard to certain regulatory programs. See, for example, the hybrid rulemaking procedures applied to the Federal Trade Commission trade regulation rulemaking proceedings, 15 U.S.C. 57a 1976. This is in obvious recognition that the vast legislative authority conferred on nonelected, essentially unaccountable administrators needs to be confined and controlled.

More importantly, the course of this authority to impose limiting procedures stems from Congress exclusive control of the legislative process, for which it is ultimately responsible under the constitution. The Constitutional obligation to control the legislative process is not fulfilled until that process is complete.

Sharing the process with the executive does not transform its nature or vest it with an executive hue. Execution of the law and therefore exclusive executive responsibility begins when there is law to execute.

A substantive agency law becomes a law only when the procedures prescribed by the Congress, Mr. Chairman, for its promulgation are fully fulfilled.

Thank you, Mr. Chairman.

I will be happy to try to answer any questions you might have.

Senator RUDMAN. Senator Schmitt, I only have one. There has been some conjecture that if we get into this area of covering the vast regulatory process of Federal Government, it is going to cause some very special problems that are essentially unanticipated and unplanned for in the Congress, in the House, Senate and our staffs. Would you like to comment on that?

Senator SCHMITT. Yes, Mr. Chairman.

First of all, I go back to the crucible experience. In those States, and there are about 8, as I recall, that have a specific legislative veto provision in their rulemaking areas and there are some 34 States that have some kind of a review process—in those 8 States, the experience has very clearly shown that there is no increase in workload, an increasing problem in dealing with this area of lawmaking. What has happened apparently is that the existence of the legislative veto at the end of the pipeline has resulted in the agency acting far more responsibly and more commensurate with the wishes of the constituencies within the individual States than they had previously. Thus, when a rule does come forward, it is one that is generally acceptable to the members of the State Legislature. I think that is a very important illustration of what we are going to have if we adopt a legislative veto provision for the National Legislature.

As a matter of fact, we have already, I think, seen that take its effect in the Federal Election Commission. They recognize that they must pay attention to their constituency, which is the Congress, before they issue regulations subject to a legislative veto, and although it is obviously too early to tell, the work of the Federal Trade Commission seems to be proceeding in a much more orderly and less controversial way as a result of the existence now of two-House legislative veto of their ruling and authority.

Finally, we have asked the Congressional Budget Office to examine this. Their conclusion supported my own and that is, for the most part, the committee, the oversight committees, and authorizing committees already have in place the mechanism and are utilizing the mechanism for oversight of rulemaking procedures and they cannot see that there will be any necessity for a significant increase in staff to do something they are already doing today.

Again, it is a procedure that would exist at the end of the pipeline. It would run over a very specific period of time. It would not be possible for the Congress to review all the detailed work that has gone into the creation of a specific rule, only to review whether that rule comports with the intent of Congress, with the economic realities of a certain period of time and, maybe most importantly, with commonsense as we see it, as we work with our individual constituencies.

Senator **Rudman**. Thank you.

Senator Levin?

Senator **Levin**. I don't have any questions.

I simply concur in what Senator Schmitt has said about the deterrent effect of legislative veto. That is the principal effect it has. We had in hearings last year before this committee testimony by Congresswoman Fenwick on the effect of legislative vetos, in that case a two-House veto, with the President, as I remember, in the HUD statutes.

I concur with Senator Schmitt on the deterrent effect that legislative veto has.

Senator **Schmitt**. I thank the Senator for his comment and recognize his leadership in making sure the more general issues of congressional responsibility for review of regulations is a very important concept for the future.

Mr. Chairman, from a philosophical point of view, I think it is clear that the Founding Fathers never anticipated when they framed the Constitution the size to which the fourth branch of Government, if you will, would grow. The bureaucracy, with all its good intentions, has grown to proportions that were feared by the Founding Fathers, if you read some of their writings, but clearly is beyond the comprehension of those same gentlemen at the time. However, in the framing of article I of the Constitution, and in particular the legislative powers granted to the legislative branch, they recognize that they could not anticipate everything that was going to happen, and they inserted appropriate language, the necessary and proper clause, to give the Congress flexibility to move throughout an indefinite number of centuries to adjust to the realities of Government as they develop. And here I think we see the Congress is gradually coming to grips with the realities of oversight of this tremendous branch of Government that has grown up, and whatever the President might do, whatever good intentions we may have about reducing the size of the bureaucracy, and we must do that, we must also recognize that modern society requires a much different approach to Government than did the society 200 years ago.

The rate of change is accelerating, the interaction of various components of our society is far greater than it was ever conceived to be in those times. So new instruments of legislative procedure under proper constitutional safeguards are going to be absolutely necessary as we move into the third century.

I appreciate the opportunity to testify on the subject with you. I feel very humble in the presence of one of the foremost Attorney Generals in the country, but I do hope you recognize the constitutional, the legal and the practical reasons for what we are proposing.

Senator RUDMAN. I read your legal memorandum. I must say, for an astronaut, you write very good law.

Senator SCHMITT. Maybe I edit good law.

Senator RUDMAN. Thank you very much.

[Senator Schmitt's prepared statement and testimony before the House Committee on the Judiciary follow:]

PREPARED STATEMENT OF SENATOR SCHMITT

CONGRESSIONAL EXPERIENCE WITH THE LEGISLATIVE VETO

Mr. Chairman, I appreciate the opportunity to testify before your Committee on the legislative veto. In my judgment, too often the debate on this issue is couched in terms that are abstract, speculative, and even ominous. Critics of the legislative veto treat it as some sort of specter, hovering on the horizon as a threat to our constitutional system.

My remarks today are based on what has happened, not on what might happen. It is important for us to look at the record, not at hypotheses and conjectures.

In particular, I want to review our experiences with legislative vetoes in four areas: executive reorganization, impoundment, federal salaries, and regulations issued by the Federal Election Commission. These legislative vetoes have been in place for years. In the case of executive reorganization, we can measure the record in decades—a half century, in fact. I believe the record of these four legislative vetoes provides convincing evidence that the legislative veto is a satisfactory instrument for both branches. The Executive benefits by receiving broader delegations of power. Congress benefits by retaining a check. The story is one of mutual accommodation.

EXECUTIVE REORGANIZATION

The one-House veto attached to reorganization authority is a classic case of accommodation between the executive and legislative branches. Starting with Herbert Hoover, Presidents have asked Congress for authority to reorganize the executive branch, subject to legislative review and disapproval within a specified number of days. The history of this process shows that it originated because of a presidential request, not congressional encroachment.

In his 1929 annual message to Congress, Hoover said he saw "no hope for the development and a sound reorganization of the Government unless Congress be willing to delegate its authority over the problem (subject to defined principles) to the Executive, who should act upon approval of a joint committee of Congress or with the reservation of power of revision by Congress within some limited period adequate for its consideration." Hoover continued to seek this authority until Congress, in the Economy Act of 1932, granted him his wish. Under this authority the President could propose a reorganization by an Executive order, which would be transmitted to Congress but would not become effective until 60 days had expired. Any Executive order or any part of an Executive order would become null and void if either House, within the 60-day period, passed a resolution of disapproval.

President Hoover issued eleven Executive orders that consolidated some 58 governmental activities. By the time the orders were released, however, he had been decisively defeated in the general election. The House of Representatives, preferring to leave reorganization changes to his successor, Franklin D. Roosevelt, disapproved all of the Hoover proposals.

Because of these disapprovals, Members of Congress concluded that necessary retrenchment by the President would be impossible so long as Congress, subject to diverse interest groups, retained a veto. Also, President Hoover had raised a question about the constitutionality of the legislative veto. In vetoing an Urgent Deficiency Bill, which required the approval of the Joint Committee on Internal Revenue taxation for any refunds or credit in excess of $20,000, Hoover maintained that it was unconstitutional for Congress to undertake executive and administrative functions.

These two considerations—the action of the House of Representative in blocking Hoover's reorganization proposals and uneasiness about the constitutionality of the procedure—prompted Congress to eliminate the legislative veto from the Economy Act of 1933.

The legislative veto reappeared in the late 1930s because of an interest *quid pro quo* between President Roosevelt and Congress. In 1938 the Senate voted to give the President authority to reorganize the executive agencies, subject to disapproval by bill or joint resolution. Roosevelt argued that disapproval by a concurrent resolution would be illegal and unconstitutional, since it would not be presented to him for his signature or veto.

President Roosevelt abandoned this position when it became obvious that the House of Representatives would never consent to the delegation of reorganization authority unless it retained for itself a two-House veto. This procedure became law in 1939. Ten years later, in the Reorganization Act of 1949, Congress made disapproval easier by adopting a one-House veto, and in 1957 the hurdle for legislative disapproval was lowered still further by permitting a veto by those present and voting (a simple majority) instead of a majority of the authorized membership (a constitutional majority).

From 1939 through 1980 there have been 116 reorganization plans submitted by Presidents. Twenty-three plans have been disapproved by the legislative veto, most of them by the one-House veto. Every President since Hoover has appealed to Congress to continue this authority, despite the existence of the legislative veto. Beginning in 1949, various high officials in the Department of Justice have presented arguments to justify the legislative veto in the Reorganization Act. Attorney General Griffin Bell, in a letter to President Jimmy Carter on January 31, 1977, concluded that the legislative veto attached to reorganization authority is constitutionally valid.

IMPOUNDMENT

Over the course of almost two centuries of our history, Presidents have exercised a form of "item veto" by refusing to spend certain funds appropriated by Congress. Often this was in the interest of savings and economy, representing a routine withholding of funds that did not challenge the right of Congress to determine national priorities. When funds were deliberately withheld to thwart congressional spending decisions, we gave birth to the term "impoundment."

After a particularly tense confrontation between President Nixon and Congress in 1972 over a spending ceiling, and after dozens of cases in the federal courts, Congress passed legislation in 1974 to regularize the withholding of funds. The Impoundment Control Act recognizes two types of impoundments: temporary (deferrals) and permanent (rescissions). In the case of deferrals, either House of Congress may pass a simple resolution at any time disapproving the deferral, at which point the funds must be released by the Administration for obligation by the agencies.

The Nixon, Ford, and Carter Administrations never challenged the constitutionality of the one-House veto on deferrals. They wanted the authority to impound and accepted the conditions that went with the authority. In fact, Administration officials have recommended other types of legislative veto for impoundment. In 1978, in hearings before the House Committee on the Budget, The Office of Management and Budget supported a proposal that would shorten the present 45-day period for action on rescission proposals, allowing the two Houses to disapprove a President's request at any time. Under the present system, a rescission proposal remains in effect until the statutory review period has elapsed (extending at times to 3 or 4 months because of congressional recesses). At these hearings in 1978, Dale McOmber, Assistant Director for Budget Review, told the House Budget Committee: "We recognize that the Congress should be able to overturn Executive acts to withhold funds. We support that principle and continuation of the Impoundment Control Act."

The one-House veto over deferrals has become a routine measure in the House and the Senate. Congress disapproved 16 deferrals in 1975 and 24 in 1976. The number in subsequent years declined, because of the position of the Carter Administration in generally accepting the budgetary priorities established by Congress through appropriations bills. Beginning with the Reagan Administration, however, the impoundment procedure has been used vigorously in an attempt to curb spending during fiscal 1981. Obviously there has been accommodation between Congress and the President, with the legislative veto playing a necessary link.

FEDERAL SALARIES

Prior to the establishment of the salary commission system in 1967, federal salaries from top officials were determined by periodic adjustments by Congress. Under the Federal Salary Act of 1967, salary adjustments became subject to presidential proposals every four years based upon recommendations of a quadrennial Commission on Executive, Legislative and Judicial salaries. The President's recommendations would take effect within 30 days unless one or both Houses voted to disapprove the proposals. Adoption of a simple resolution by either chamber was enough to negate the President's recommendations.

Salaries are also subject to annual recommendations of the President under the Executive Salary Cost-of-Living Adjustment Act of 1975. Presidential pay recommendations take effect within 30 days unless either House votes disapproval.

In 1974, after the President recommended pay adjustments based on the second quadrennial commission, the Senate adopted a resolution of disapproval. Congress has also attached amendments to appropriation acts to prohibit the use of federal funds to implement the President's pay adjustments for top-level officials.

In 1977 the U.S. Court of Claims upheld the constitutionality of the one-House veto in the Federal Salary Act. The case of *Atkins* v. *United States* was brought by 140 federal judges who sued the government to recover compensation for their services. Among other claims they argued that the Senate's resolution in 1974, disapproving the President's pay recommendations, was an unlawful and an unconstitutional exercise of executive power reserved to the President. Moreover, they said that the Senate resolution did not constitute the enactment of legislation in accordance with the requirements of Article I, section 7 of the Constitution, providing for the presentation of bills and resolutions to the President for his signature or veto.

The Court of Claims concluded that the one-House veto in the Federal Salary Act was an appropriate exercise of congressional authority under the Necessary and Proper Clause. That part of the Constitution, said the Court, "authorizes Congress to choose, first, to delegate the initial power to make proposals to the President, and, then, to select for itself the appropriate method for checking and monitoring the President's action." Quoting from the landmark case of *McCulloch* v. *Maryland* (1819), the Court said that the Necessary and Proper Clause authorizes Congress "to exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government" and to "avail itself of experience, to exercise its reason and to accommodate its legislation to circumstances."

The decision by the Court of Claims was confined to the specific mechanism in the Federal Salary Act. The one-House veto related only to the matter of salaries, which the Court said was "traditionally within the peculiar province of the legislative branch." However, Mr. Chairman, I think the reasoning of the Court of Claims allows us to reach a more general understanding about the legislative veto.

What I find interesting about this decision is the fact that the Court of Claims recognized that the Senate resolution was not an act of law-making. By disapproving the President's recommendation, the Senate preserved the legal status quo. The President's recommendation was not law. It merely had, as the Court said, the "potentiality of becoming a law." It is therefore a misconception to say that the one-House veto is an invalid form of law-making or that it invades the administrative powers of the President. Quoting again from the Court of Claims: "When a single House negates the President's recommendations, as the Senate did by S. Res. 293, precisely the same result is reached as if one House voted down a proposal for new legislation: there is no change in the law."

In 1977 Congress changed the procedure for voting on federal salary recommendations submitted every four years by the President. Instead of a one-House veto, each House is required to conduct a separate vote on each of the pay recommendations for the three branches. The statute (P.L. 95-19) provides that each House shall approve or disapprove, by roll-call vote, the recommendations for each category. If both Houses approve, the recommendations take effect.

On March 12 of this year the House of Representatives adopted a sense-of-the-House resolution that the approval of the pay recommendations by President Carter "would be inappropriate at this time". This action conformed to the position announced by President Reagan through his Budget Director, David Stockman. On that same day, the Senate adopted a series of resolutions disapproving the pay recommendations of President Carter.

FEC REGULATIONS

In 1971 Congress passed legislation to supervise campaign finance laws. The Clerk of the House was responsible for overseeing House elections, the Secretary of the Senate for Senate elections, and the Comptroller General for presidential elections. To improve the supervision, Congress established the Federal Election Commission in 1975 to monitor the application of the new campaign finance laws.

In 1975, on two occasions, Congress vetoed regulations proposed by the FEC. The membership of the Commission was declared invalid by the Supreme Court in 1976, in *Buckley* v. *Valeo*, and for a time the Commission ceased to operate. Legislation in 1976 reconstituted the Commission, taking from Congress its previous authority to appoint some of the members of the Commission. In 1979 Congress exercised its veto power by disapproving a proposed FEC regulation.

The legislative history supports the need for legislative veto. As noted by the Committee on House Administration in 1974, "no legislation purporting to regulate election campaign activities can be drawn to fully anticipate every contingency." Each campaign is unique. Regional and local variations further complicate the matter. Congress, therefore, found it necessary to delegate broadly to the supervisory officers extending to them substantial latitude in the formulation of regulations. Because of the broad grant of power, and allegations that the supervisory officers under the 1971 statute had departed in some instances from congressional intent, the Committee found it "desirable to provide in the bill a mechanism for improved congressional monitoring of regulations proposed by the supervisory officers in this area."

The House bill provided for the transmission of all proposed FEC regulations to the Committee on House Administration and to the Senate Committee on Rules and Administration. Each Committee could disapprove the regulations within a 30-day review period. The Committee veto mechanism, criticized as a threat to the independence of the Commission, was later replaced by the requirement that either the full House or Senate vote to disapprove FEC regulations.

On July 31, 1975, the Commission sent to Congress for review its first proposed regulation—to treat Members' office accounts as campaign funds subject to the limitations on contributions and expenditures under the new campaign finance law. After initial criticism, the Commission submitted a revised regulation on September 30, by the Senate Rules Committee concluded that both versions were unacceptable because they discriminated against incumbent Members of Congress. The Senate disapproved the regulation. The Commission issued a new regulation, taking into account the criticism directed at its previous efforts, but shortly thereafter the Supreme Court handed down its decision in *Buckley* v. *Valeo.*

At about the same time that the Senate defeated the office accounts regulation, the House of Representatatives disapproved another FEC regulation which stipulated that candidates must first file their campaign finance reports with the FEC before copies would be made available to Congress (the point of entry regulation).

Both regulations failed in large part because the Commission issued them before receiving public comment and congressional input. The Commission subsequently announced a new operating procedure, inviting public and congressional participation before finalizing a regulation. Consultation, triggered by the legislative vetoes, has been a key ingredient in creating a better relationship between Congress and the Commission. When the Senate disapproved a regulation that the FEC proposed in 1979, concerning the funding and sponsorship of candidate debates, the Senate's action lacked the rancor that had characterized earlier contacts between Congress and the Commission.

In an interview in 1979, Neil Staebler, one of the original FEC members, spoke favorably of the legislative veto. He noted that there was always a "borderline or hazy area" in regulations, and that it would be unwise to give a commission like the FEC carte blanche authority. As a small body, unable to know all the subtleties of campaign financing, "it could conceivably go off on a tangent." He concluded that there should be a way of holding the whole process to some kind of accountability and that the legislative veto was well suited for that purpose.

Mr. Chairman, I have reviewed the record of these four legislative vetoes to underscore the workability of this procedure. Congress has conscientiously selected a mechanism tha appropriately balances the need for executive initiative with the requirement for congressional review. Both branches recognize the need for broad delegations of power to permit adaptation to changing and unpredictable circumstances. The legislative veto remains an essential check for controlling delegated power.

Mr. Chairman, on March 24, I testified before the House Judiciary Committee on the legislative veto. At that time I discussed the constitutional issues of the legislative veto in some detail, and I would ask that this statement be made part of your hearing record.

TESTIMONY OF SENATOR SCHMITT BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY, MARCH 24, 1981

Mr. Chairman, thank you for offering me the opportunity to testify before this Committee on the issue of regulatory reform. As you may know, I am the sponsor of a bill, S. 382, The Regulatory Reduction and Congressional Control Act of 1981, that would provide for the use of a Congressional veto of rules promulgated by both independent agencies and the departments under the Administrative Procedures Act.

I believe that an objective consideration of the rationale underlying the proposals contained in the bill will demonsrate that legal objections heretofore raised against other congressional review mechanisms are inapplicable. The Constitutional purpose of S. 382, to bring the administrative rulemaking process under control, is complementary to the President's similar objective as reflected in Executive Order 12291.

Section 3 of S. 382 would amend the Administrative Procedure Act, 5 U.S.C. 551 et seq., by adding a new chapter entitled "Congressional Review of Agency Rulemaking" which would establish what has come to be called a one-and-a-half House veto over administrative rules. That is, proposed final agency rules would have to be submitted to Congress and would become effective if within 60 days one House passes a resolution of disapproval and within 30 days thereafter the other House does not pass a resolution disapproving the resolution of disapproval. The amendment also establishes a mechanism to trigger reconsideration of already effective rules.

Thus, S. 382 deals exclusively with the administrative rulemaking process. It does not involve or intrude in any way upon the executive decisionmaking process. Rather, it is a proper extension of Congressional control over the constitutional lawmaking process which has received judicial approval in both this and closely related contexts. It is no more than another aspect of the historic practice of cooperative interaction of the Legislative and Executive branches from the time our nation began the business of governing in 1789.

WHO WRITES THE LAWS

What appears to be lost in the current debate over how to control the nation's bureaucracy, and the manner of that control, is a perception of the true nature of the rulemaking authority of administrative agencies. Rulemaking power is of course the dominant feature of the modern administrative agency. Though the promulgation of rules has been a normal feature of American government from its very inception, it is only during the present century that rulemaking authority has brought about a shift in the center of gravity of lawmaking. The advent of the modern administrative state has brought with it a magnitude of legislation unforeseen by the Founding Fathers. As a consequence, Congress has not been able to directly perform its now greatly expanded tasks of regulation and guardianship of the public weal. It has been required to delegate the task of legislation to its administrative creations. Today, administrative legislation dwarfs the primary legislation functions of Congress.

Moreover, as a consequence of this development, modern statutes delegating rulemaking authority, as a result of the complexity and breadth of the subject of regulation, have blurred the line between principle and detail. Because of the vastness of the current delegations, the legislative mandate is a mere skeleton; what is left to the delegate are not minor details, but the formulation of many of the essential principles in the law as well. Rulemaking today extends to the essence of the legislative scheme. In many instances, the rules and regulations may be of greater practical importance to those subject to an agency than are the broad provisions laid down by the Congress.

Further, properly promulgated rules and regulations have the same legal effect as statutes. Their provisions have the force of law and they are backed by the same sanctions as statutes, including in many instances the criminal sanctions designed to coerce obedience to the law. Thus while administrative legislation may be only quasi legislation (See, *Humphreys Executor* v. *United States,* 295 U.S. 602 (1935)), since its provisions are subordinate to administrative actions relative to those enacted by the legislature, this does not alter the fact that its impact is comparable to that of statue law itself.

The source of this enormous administrative power must at all times be kept in mind, however. Legislative power exists as a result of an act of delegation. This is true even of the Congress which has been vested with limited legislative power by the Constitution. An administrative agency possesses rulemaking authority because a statute has delegated such authority. Without a statutory delegation, an agency does not have power to promulgate substantive rules and regulations. For an agency to be vested with authority to affect substantive rights and obligations through rules and regulations, rulemaking power must be delegated to it expressly. See, e.g., *Brannan* v. *Stark* 342 U.S. 451 (1952).

The validity of the modern practice of broad delegations of Congressional lawmaking authority is not in doubt. *Yakus* v. *United States,* 321 U.S. 414 (1944); *Lichter* v. *United States,* 334 U.S. 742 (1948); *Amalgamated Meat Cutters* v. *Connally,* 337 F. Supp. 737 (D.D.C. 1971) (3-judge court). What appears to have been obscured, however, is the fact that judicial validation of such extensive delegations has not changed the essential nature of what is being delegated and the process of which is a part: rulemaking remains lawmaking even when it is performed by an administratives agency; and lawmaking remains a task committed by the Constitution to the Congress. Ultimate constitutional accountability for legislation rests with the legislature. Although many of the needs of modern government have required that Congressional responsibility for lawmaking be shared with Executive branch agencies, the ultimate constitutional responsibility, and therefore control, remains with Congress.

The essential legislative nature of substantive administrative rulemaking is well established in law. The issue has arisen in cases in which courts have been faced with the question of the applicability of procedural due process requirements to rulemaking proceedings of administrative agencies. The uniform answer of the courts has been to treat the administrative exercise of legislative powers similarly to the direct exercise of power by the legislature. The agency was found to be no more bound by constitutional procedural requirements than the legislature itself when it enacts a statute. Since procedural due process does not limit the legislature, the same principle has been consistently applied where rulemaking powers were exercised under legislative delegation. As one court has put it: "in legislation, or rulemaking, there is no constitutional right to any hearing whatsoever." *Willapoint Oysters* v. *Ewing,* 174 F.2d 676, 694 (9th Cir. 1949).

The leading case in this regard is the Supreme Court's decision in *Bi-Metallic Co.* v. *Colorado,* 239 U.S. 441 (1915). There the Court sustained an order of the State Board of Equalization increasing the value of all taxable property in Denver by 40 percent, without an opportunity being afforded affected taxpayers to be heard before the order was made. The agency order plainly deprived the taxpayers of property but the Court rejected their claim that due process required an opportunity to be heard. Justice Holmes speaking for the Court analogized the agency's action to direct action by the legislature: "If the result in this case had been reached as it might have been by the State's doubling of the rate of taxation, no one would suggest that the Fourteenth Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it" *Id.* at 445. Since the Constitution does not require legislative acts to be done in a town meeting or assembly of the whole, it similarly does not require due process procedural requirements when such legislative authority is validly exercised by a delegate administrative agency.

The Court has since confirmed that when a proceeding is classified as rulemaking, due process ordinarily does not demand procedures more rigorous than those prescribed by Congress. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 524 N.1, 542, n.16, (1978). It has reaffirmed that Congress is under no requirement to hold an evidentiary hearing prior to its adoption of legislation, and that "Congress need not make that requirement when it delegates the task to an administrative agency." *Bowles* v. *Willingham,* 321 U.S. 503, 519 (1944), citing *Bi-Metallic* approvingly.

The clear import of these cases is that the nature of lawmaking does not change once there has been a valid delegation of authority to an agency. If Congress had not enacted the Administrative Procedure Act, agencies would be free to administratively legislate in the same manner that Congress makes laws. Conversely, Congress can, and has, legislated general, minimum procedural requirements for rulemaking, in the Administrative Procedure Act, and more specific, detailed requirements with regard to certain regulatory programs. See, e.g., the hybrid rulemaking procedures applied to Federal Trade Commission trade regulation rulemaking proceedings, 15 U.S.C. 57a (1976). This is in obvious recognition that the vast legislative authority conferred on non-elected, essentially unaccountable administrators needs to be confined and controlled.

More importantly, the source of this authority to impose limiting procedures stems from Congress' exclusive control of the legislative process for which it is ultimately responsible under the Constitution. The constitutional obligation to control the legislative process does not end until that process is complete. Sharing the process with the Executive does not transform its nature and invest it with an executive hue. Execution of the law, and therefore exclusive executive responsibility, begins when there is a law to execute. A substantive agency rule becomes a law when only the procedures prescribed by the Congress for its promulgation are fulfilled.

This analysis is plainly confirmed by the only judicial decisions to date to reach the merits of statutory provisions providing for Congressional review mechanisms. A close reading of those cases supports the principle of plenary Congressional control of agency lawmaking.

COURT DECISIONS ON THE LEGISLATIVE VETO

Despite almost fifty years of experience with the legislature veto, the courts have only recently begun to examine its constitutional standing on a case-by-case basis. The Supreme Court has never formally ruled on the matter. In a pair of recent cases, the Court of Claims and the Court of Appeals for the Ninth Circuit split on the constitutional merits of single house negative veto provisions in different contexts. In *Atkins* v. *United States,* 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied,* 434 U.S. 1009 (1978), the Court of Claims upheld the constitutionality of the one-house veto in the Federal Salary Act, U.S.C. §§ 351, et seq. In *Chadha* v. *Immigration and Naturalization Service,* 634 F.2d 406 (9th Cir. 1980), a three judge court of appeals panel struck down section 254(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2), which allowed either House to overturn a decision by the Attorney General to suspend an order deporting an alien for reasons of hardship. The significant, principled difference between the two decisions is that the Court of Claims viewed the veto under the Federal Salary Act as operating in a traditional legislative sphere whereas the veto applicable to suspensions of deportation was held to constitute an unwarranted Congressional intrusion into execution of the laws and judicial review. This distinguishing feature between the two cases makes it apparent that there would be judicial support for the review procedure contained in section 3 of S. 382.

The legislative veto in general raises a number of serious questions under various specific and significant constitutional provisions of principles including (1) the provisions of article I, section 7, clauses 2 and 3, (the Presentation Clause) which makes the President a participant in the lawmaking process and accords him power to veto not only every bill, but also every "order, resolution, or vote to which the concurrence of the House and Senate may be necessary"; (2) the allocation to the President in the "take care" clause of article II, section 3—as augmented by article II, section 1 clause 1, vesting in him the "executive power"—of the power of execution of statutes as enacted; and (3) the disability and incompatibility clause in article I, section 6, which separate members of Congress from administrative functions. In addition, if the congressional veto device takes the mode of the one-house veto, or the committee veto, rather than the mode of the concurrent resolution, the bicameralism requirement for statute making and statute modification set forth in article I, section 7, is arguably violated. These problem areas are generally referred to as the Presentation Clause argument, the Separation of Powers argument, and the Bicameralism argument, respectively.

As indicated, although the Supreme Court has yet to pass on the constitutionality of the legislative veto, two lower cases, a recent opinion of former Attorney General Griffin Bell, and the Executive practice under the Impoundment Control Act of 1974, provide a framework for analyzing these arguments.

ATKINS V. UNITED STATES

In *Atkins* v. *United States,* 556 F. 2d 1028 (1977), *cert. denied,* 434 U.S. 1009 (1978), 140 federal judges challenged the constitutionality of the veto provision contained in the Federal Salary Act, 2 U.S.C. §§ 351, et seq. Under that Act, all or part of the presidential recommendations regarding executive, legislative, and judicial rates of pay become effective automatically within a specified time unless: (1) Congress by law establishes pay rates different from those recommended; (2) either House of Congress disapproves all or part of recommended rates; (3) or both.

The Senate disapproved the President's recommendation and the judges sued arguing that the Senate's action was invalid as violating the Presentation Clause, the Separation of Powers doctrine, and the principle of bicameralism. The court, by a 4-3 vote, rejected these arguments and sustained the constitutionality of the one-house veto under the Federal Salary Act.

The court held that the principle of bicameralism is not violated because rejecting presidential recommendations to increase salaries is a form of legislative activity which does not require the affirmative concurrence of both Houses since the effect of such action is not to make law but rather to preserve the status quo. Similarly, there was no nullification of the presidential veto since the Executive had his opportunity to veto the Federal Salary Act which established the veto device in the first place. Moreover, the concurrence of both Houses was not constitutionally required where only presidential recommendations are involved. Finally, the court held that the application of the one-house veto in these circumstances did not violate the Separation of Powers doctrine. To begin with, the court reasoned the doctrine was never intended and did not operate to create a strict compartmentalization of powers between branches. Rather, it was designed to prevent the concentration of too much power in one branch and the consequent weakening of the other branches. The settling of rates of pay, the court found, is basically a legislative function. Under the Federal Salary Act the function is conditionally delegated to the Executive. Since there was no irrevocable commitment of power, the President in recommending rates of pay was acting as an agent of the Congress. The legislative veto under the Federal Salary Act did not enforce any law or appoint any agents to enforce the law and thus did not intrude into the Executive's domain of adminstration of the law. Accordingly, the one-house veto in the circumstances of that case was a permissible device in aid of legislation in basically a legislative matter.

CHADHA V. IMMIGRATION AND NATURALIZATION SERVICE

In *Chadha* v. *Immigration and Naturalization Service*, 634 F.2d 408 (9th Cir. 1980), a three judge panel unanimously struck down section 254(C)(2) of the Immigration and Nationality Act, 8 U.S.C. §1254(c)(2), providing for a one-house veto of agency suspensions of deportation. Here, the exercise of the veto by the House of Representatives operated to revoke the Attorney General's suspension order and to deport a person to a country which the Attorney General had found would impose real hardship on the deportee. The veto device in these circumstances, the court held, violated "the constitutional doctrine of separation [of powers] because it is a prohibited intrusion upon the Executive and Judicial branches." *Id.*, at 420.

CHADHA IS NOT DISPOSITIVE

Recently some persons have suggested that the outcome in *Chadha* will decide this issue. In my view such a result is unlikely. That argument would have significance only if one legislative veto device necessarily invalidated all such provisions. This position is undercut by the fact that the Ninth Circuit confined *Chadha* to the facts of the case before the court. The *Chadha* panel stated:

"Although the practicality of alternative to legislative disapproval in other situations raises difficult questions, we are not here faced with a situation in which the unforeseeability of future circumstances or the broad scope and complexity of the subject matter of an agency's rulemaking authority preclude the articulation of specific criteria in the governing statute itself. Such factors might present considerations different than those we find here, both as to the question of separation of powers and the legitimacy of the unicameral device." (634 F.2d at 432-433.)

ATTORNEY GENERAL BELL AND THE EXECUTIVE REORGANIZATION ACT

Attorney General Griffin Bell's opinion examines the constitutionality of the legislative veto in the Executive Reorganization Act of 1977, 5 U.S.C. §906. (See Opinion of the Attorney General, January 31, 1977). Under that Act, the President may formulate plans for reorganizing executive branch agencies which reorganizations go into effect unless disapproved by either House within 60 days of their submission to Congress. The veto in this context, he concluded, was constitutional.

For Attorney General Bell the critical question was not whether the scheme for implementing executive branch reorganizations adhered strictly to the legislative chronology outlined in the Presentation Clause. Deviations from the pattern laid out there were not ipso facto barred by the Constitution. In line with the rationale of the decisions in *Atkins* and *Chadha*, the Attorney General was of the view that such deviations, i.e., the one-house veto, were permissible if they did not impinge on the separation of powers and its corollary, the system of checks and balances. In other words, if the veto device did not alter the constitutional allocation of power between the legislative and executive branches, i.e., if the presidential veto is effectively preserved and the principle of bicameralism is respected, procedural variations in the process of lawmaking were not unconstitutional. The Attorney General indicated that the Presentation Clause is not violated by this procedure because the President has ultimate veto power in his formulation of the reorganization plan. Characterizing the principle of bicameralism as the "right of each House of Congress that there be no change in the law without its consent," the Attorney General concluded that this principle is respected because no reorganization plan can take effect if opposed by either House, that is, the status quo is preserved. The doctrine of separation of powers is not abridged because there is no assumption by Congress over administration of the law and, consequently, no invasion of the traditional role of the executive branch.

In line with the courts in *Atkins* and *Chadha*, the Attorney General stressed that his opinion was limited to the provision under review. He distinguished the President's option not to submit a reorganization plan with situations created by statutes that provide for subsequent resolutions disapproving presidential actions in the administration of ongoing programs. The pressures of an ongoing program with prior commitments force the President to act, he alleged. Legislative veto devices in these situations require the President to take actions that are acceptable to Congress in ways that subject presidential decisions to increased Congressional influence and effectively compromise control over his actions. According to Attorney General Bell, these statutes frustrate the constitutional check of the presidential veto in violation of Article I and contravene the doctrine of separation of powers. Of course, in the case of rulemakaing, these arguments are balanced by the Congressional responsibility to oversee delegated legislative activity.

Finally, I would draw your attention to Executive branch practice and acquiescence to the requirements of section 1012 of the Impoundment Control Act of 1974, 31 U.S.C. 1402, which authorizes the President to reserve appropriated monies from obligation only if Congress within 45 days approves a "rescission bill" effectively rescinding previously granted budget authority. The reason for the rescission process ultimately adopted was explained by a key spokesman on the legislation as follows: "Inasmuch as as rescission represents the undoing of what Congress previously enacted, it is entirely appropriate that no rescission be authorized except by affirmative vote of both Houses." (Prepared remarks of Representative Bolling in offering the conference report, House Report No. 93-924, on June 18, 1974, reprinted in committee print entitled "Congressional Budget and Impoundment Control Act of 1974, Public Law 93-244: Legislative History", Senate Committee on Government Operations, 93d Congress, 2d Session (December, 1974), page 1917). The Executive appears to have had no difficulty, in principle, in complying with this requirement.

CONCLUSION

As you are aware, S. 382 would subject only agency rulemaking to Congressional review and possible veto. It does not effect in any way agency decisional processes in furtherance of the execution of laws enacted by Congress nor does it interfere with quasi-judicial agency decisionmaking. Thus, S. 382 comes within the rationales of the existing cases, former Attorney General Bell's opinion on reorganization initiatives and practices under the Impoundment Control Act I have just described. In particular, the circumstances and rationale of the *Atkins* case comes factually close to S. 382 while those considerations which led the court in *Chadha* to strike down the veto device involved there are far removed from agency action under the Administrative Procedures Act that is to be covered by the bill.

Further, since my proposal effectively implicates both Houses of Congress in the decision to veto an agency rulemaking, the Bicameralism argument against some forms of the legislative veto loses its force.

Also, there would be no nullification of the presidential veto since the passage of a resolution of disapproval merely preserves the status quo.

Finally, and most importantly, the thrust of my proposal impacts exclusively on the essence of the legislative function: the setting of policy for the nation. Indeed, there is no way to divorce Congressional policymaking and legislative origination (U.S. Constit. Art. I, sec. 1: "All legislative Powers . . . shall be vested . . . Congress. . . .") from the authority delegated to agencies to promulgate administrative legislation consistent with the Congressionally determined policy decision.

Let me conclude by reiterating my fundamental perception of the issue. Substantive rulemaking by administrative agencies is a delegated legislative function that remains part of the legislative process and is subject to such procedural requirements, limitations and conditions as Congress sees fit to impose in order to preserve the integrity of that process as well as to fulfill its constitutional responsibility as the ultimate Federal lawmaker. As there is no irrevocable commitment to rulemaking power. Agencies exercising delegated lawmaking authority are acting as agents of the Congress. In line with *Atkins* and contrary to the *Chadha* situation, the veto provision in S. 382 does not enforce any law or appoint any agents to enforce any law and does not adversely effect judicial review. S. 382 does not intrude into the Executive's power to administer the law or the Judiciary's right to review and interpret it. Accordingly, legislative veto embodied in S. 382 is a permissible device in aid of legislation in a legislative context.

Senator RUDMAN. Our next witness will be John Opel, president of IBM, representing the Business Roundtable.

We are very pleased to have you here.

TESTIMONY OF JOHN R. OPEL, PRESIDENT, INTERNATIONAL BUSINESS MACHINES CORP., ON BEHALF OF THE BUSINESS ROUNDTABLE, ACCOMPANIED BY NEIL KING OF WILMER, CUTLER & PICKERING, COUNSEL

Mr. OPEL. Thank you, Mr. Chairman.

I am delighted to be here and represent the roundtable and its Task Force on Government regulation.

It gives me an opportunity to acknowledge the contribution of this committee to reform Federal regulation. As you know, our task force has consulted extensively with the executive branch and Members of Congress and their staffs in these reform initiatives in both the 96th and the 97th Congress.

While the Roundtable enthusiastically welcomes specific deregulatory actions which the administration has taken, we nonetheless believe that across the board regulatory reform legislation must also be enacted for some very important reasons. They are to codify the principles of procedures set forth in the Executive Order No. 12219, to extend those provisions to the independent regulatory agencies and to make other changes in rulemaking procedures and standards of judicial review, which cannot be put into effect by Executive action.

A detailed statement of our views on S. 1080 has been submitted for the record and I will try to limit my statement only to those major issues.

Our view is that the enactment of S. 1080 is necessary to send a clear and permanent signal to the regulatory community that Congress intends regulatory actions to be taken only after careful consideration of costs, as well as benefits, and the overall impact of the regulation on our economy and our own society.

Legislation should embrace three basic areas of reform. First, some measure of central oversight of actions by all regulatory agencies should be established and, second, major rules should be treated differently. They should be required to undergo regulatory analysis and meet cost-benefit and cost-effectiveness standards.

Third, the current standards of judicial review of agency actions should be strengthened to prevent agencies from exceeding their authority delegated to them by Congress.

We see these components as interdependent on each other and each is necessary to be effective in order to achieve lasting reform of Federal regulation.

Without any one of them, the other provisions cannot permanently prevent a return to what has been called runaway regulation. In most respects we believe S. 1080 meets these three objectives. Let me amplify that a bit.

First, on the subject of executive branch management: We believe that a measure of Executive oversight and enforcement is necessary to insure that individual agencies' actions comply with the requirements imposed by legislation and by Executive order and that such agency's actions are not in conflict with other regulations or other national priorities. Accordingly, we support the Executive oversight amendment developed jointly by the Senate Judiciary Subcommittee and this committee. This amendment would confirm the authority of the President or his designee to insure agency compliance with the reform provisions of this legislation.

Second, on regulatory analysis and agency rulemaking procedures. In our view, the single most important reform in the legislation, is the regulatory analysis requirement for major rules.

We fully support the provisions of S. 1080 which require agencies to identify and assess potential benefits and estimated costs of all such rules as well as of reasonable alternative approaches to achieving the same regulatory objectives.

Equally important, unless precluded by law, agencies should adopt major rules only when the potential benefits of the rule justify potential costs and only where the alternative selected is the most cost-effective approach that substantially makes it possible to achieve the rulemaking objectives.

In our view, the cost-benefit analysis is a method for achieving reasonable balance between benefits of regulation and costs incurred in realizing those benefits. And we must achieve a balance between regulatory goals and our ability as a Nation to bear the cost of achieving those goals.

Given the state of our economy and the unalterable fact of economic scarcity, we simply cannot afford to divert resources to regulatory goals in an inefficient manner. To assess the impact of regulatory proposals, we need improved information which will be provided by the cost-benefit and cost-effective analyses. These two assessments are simply a management technique mechanism designed to provide decisionmakers with information and the kind of information they should have in order to make intelligent judgments. That information includes economic data projections, scientific facts, estimates, hypotheses, risk estimates and various kinds of other information, theory and even educated guesswork.

It is a mistake, in our opinion, to become preoccupied with questions of whether benefits can be reduced to numbers or whether costs can be calculated with intense precision or whether claims of contending parties can be trusted. What is recommended is simply a process of marshaling and analyzing information. The process, in fact, is a very familiar one. Congress relies extensively on economic and scientific estimates which it gathers from various sources to assist in its judgment and so does the executive branch and so does every major business in the country.

Despite the problems associated with peering into the future, the effort is indispensable to rationalize decisionmaking and effective planning. We see no reason why this process should be controversial or why it should unduly complicate the regulatory decisionmaking process.

A number of major rules requiring full dress regulatory analysis is estimated by the administration to be about 150 a year. And in the last several years, all of the agencies have gained experience in economic analysis and we do not think the additional burden imposed by this requirement would be very great.

To summarize, the regulatory analysis approach embodied in S. 1080 has several advantages. It imposes a needed economic discipline on the regulatory process by requiring cost-benefit and cost-effective analysis for all major rules. It allows Congress to determine whether or not cost-benefit and cost-effectiveness considerations are appropriate decision criteria. And where they are not appropriate, their consideration can be precluded by law as was done in the Delaney clause of the Food, Drug and Cosmetic Act and in the primary ambient air standard provisions of the Clean Air Act.

At the same time, the fact that regulatory analyses are performed gives Congress the information on which to determine whether cost-benefit and cost-effectiveness considerations should be utilized as a decision criteria. S. 1080 reflects a realistic recognition of the state of the art of economic analysis as a part of it but not a substitue for rational policy decisionmaking.

The roundtable, therefore, favors the changes to the Administrative Procedures Act embodied in S. 1080 to expand the use of legislative-type hearings in all major rulemaking. Also at the agency level, we feel that current requirements under the Administrative Procedures Act are not adequate for complex, far-reaching Government regulations.

I would also like to address the question of whether these management and procedural reforms will overburden or delay the rulemaking process.

A majority of these procedures apply only to major rules which have a substantial impact on our economy. This is a fairly small number of rules.

Moreover, a minor delay in rulemaking is a small price to pay for the benefits of applying economic discipline to the regulatory process. In addition, the so-called hybrid procedures represent fairly limited reform. The legislative type oral hearings with or without cross-examination are already standard practice in many agencies today. Many of these hearings take less than a day and even the more protracted hearings rarely extend from more than 1 to 3 weeks.

In rulemakings which often consume 1 year or more, such an extension is a relatively small amount of time.

Finally, on the subject of judicial review: A number of people who support the imposition of new procedures are concerned about subjecting agency compliance of these requirements to judicial review. They fear that the process will become overly judicial and that policy decisions will be shifted to the courts. And the roundtable simply believes these concerns are overstated. Without some degree of judicial protection on the issue of agency compliance with the most important reforms that are embodied in S. 1080, the danger is that the implementation of these reforms would be optional and, therefore, not achieved. In our view, the courts should be empowered to review on a limited basis three important aspects of agency compliance with the new procedures of requirements. The court should have some role in assuring the agencies do not shortcut the regulatory analysis process by refusing without justification to treat a proposal as a major rule.

Next, the court should have some role in assuring that the agencies do not make cost-effectiveness and cost-benefit claims that cannot be justified by the full record of the rulemaking procedure. The courts should also have some rule in insuring that agencies do not unjustifiably deny interested persons procedural rights that are essential to a fair resolution of issues central to the rulemaking procedure taken as a whole. The approach we recommend for each of these objectives is spelled out in my written statement.

In addition to these changes, S. 1080 would also amend the standards of judicial review of the Administrative Procedures Act in three respects. Most importantly, it directs a reviewing court to set aside an agency rule when factual basis for the rule lacks substantial support in the rulemaking record. And it requires agencies to show that their rulemaking actions are within the scope of the authority delegated to them by Congress.

It makes clear that when deciding questions of law, the courts should not entertain any presumption for or against the validity of the agency's action.

We strongly support this provision.

Before I take your questions, I do want to make it clear that in supporting the reform of the regulatory process, the members of the roundtable remain fully committed to the achievement of the important national objectives, such as a healthy environment and safe work places. We recognize the fact that some regulation is required to insure that these objectives are met. We believe, however, that it is possible to accomplish these kinds of desired results within a cost-conscious framework that is consistent with many other important, national goals such as the restoration of American economic growth and productivity.

Failure on the part of Congress to impose economic discipline on the regulatory process would leave the door open to a continuation of runaway regulation in the long run.

We, therefore, urge you to enact a comprehensive regulatory reform bill and we certainly stand ready to assist you and your staffs in that effort.

Mr. Chairman, that concludes my remarks on S. 1080; however, in your letter of June 14, you also requested some comments on S. 344, the Levin-Boren bill, the legislative veto proposal. We understand Congress concern about the agencies' exercise of delegated authority. Legislative veto may be appropriate for some specific agencies. However, the roundtable doesn't have a consensus on this matter and does not support the across-the-board legislative veto.

There are important constitutional questions involved and valid concerns about politicizing the rulemaking process and there is substantial disagreement among sponsors of competing veto proposals.

Accordingly, we urge the committee to refrain from adding S. 344, or any other across-the-board legislative veto proposal to S. 1080. The issue is better addressed in separate legislation during consideration of individual enabling statutes.

Thank you, Mr. Chairman.

I will be happy to answer your questions.

Senator RUDMAN. Thank you very much for your testimony. I only have one question. It may be a difficult one to answer. On behalf of the Roundtable at this juncture, I am sure that you are aware of the recent U.S. Supreme Court decision which, although I have not read it in detail, would appear to raise serious doubts about the applicability of statutory provisions relating to cost-benefit analysis in areas that are life-threatening. Would you care to comment at all on whether or not you believe we ought to make some conscious effort to, in fact, separate those areas of regulatory activity that are involved with life-threatening substances and instrumentalities from the vast majority of those which are not, so as not to get into a fruitless debate on cost-benefit analysis that may end up essentially nowhere.[1]

Mr. OPEL. Mr. Chairman, I think the view of the Roundtable on that is quite clear. First, in the bill itself, we are talking only about major rules. We are only asking that economic analyses be performed for major rules and, second, we are talking about a process in which both quantitative and qualitative data are disciplined and rendered explicit. So our intent is to get some economic discipline in the process which underlies the ultimate rulemaking decision. It is not our intent to substitute some abstract analyses for the requirements of the statutes or to pretend that everything in the world can be reduced to dollars and cents. So we would, of course, have no problem at all with simply rendering explicit the benefits that are expected of the regulation and trying to quantify both the costs and benefits as best as possible and put them on the table.

But we support the point of view that under S. 1080 it remains possible, if Congress chooses to do so to exclude cost-benefit analysis from specific regulatory areas where it is judged inappropriate. S. 1080 does not change any underlying statute in that regard. If cost-benefit analysis is precluded by statute, this legislation would not affect that. So we are not looking for some unrealistic or impractical discipline. We are simply asking and we firmly believe that it will improve the rulemaking process at large without coming in any way into serious conflict with what are articulated and believed to be the legitimate regulatory goals of our society.

Senator RUDMAN. I appreciate your comments because it seems to me that from any reading of this case, which takes a fair amount of reading to understand the various holdings, certainly one holding appears to be overwhelming. That is in a number of cases involving life-threatening substances and other instrumentalities, there can be no benefit or link established between the cost and the benefit.

If, in fact, that is what learned people decide this case means, then I suspect we are going to have to be very careful in this statute so we don't start out with something that already is subject to serious constitutional challenge and statutory challenge.

Senator Percy?

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[1] See letter on p. 175.

OPENING STATEMENT OF SENATOR PERCY

Senator PERCY. We do appreciate very much, Senator Rudman, your chairing this hearing today. I apologize for being late. I regretfully had a conflict with a Foreign Relations Committee hearing on the nomination of Arthur Burns, for Ambassador for the Federal Republic of Germany. There is a man who stands staunchly behind regulatory reform.

First, I would like to say to Mr. Opel, again, it is a tremendous thing for IBM Corp. to have its chief executives devote the kind of time you have to the Business Roundtable and to regulatory reform. Frank Carey did an outstanding job before you and your own testimony is a decisive and very helpful analysis of this problem. I just wish the Business Roundtable had existed when I was in industry.

The Roundtable is a most remarkable and unique organization in that it provides a mechanism for chief executive officers to take the active role they do, to take this responsibility solely upon themselves, and to join us in addressing the serious problems facing our economy. I think they have performed an outstanding job, best evidenced by the testimony they gave last year, in which Arthur Andersen's analysis and appraisal of the cost of regulation to business was publicly detailed.

Previously, we have always dealt in ball park figures derived by the Council of Economic Advisers, the Congressional Budget Office, or the Comptroller General. But, to have specifically enumerated the fact that the accumulated cost of Government regulation for selected companies in the manufacturing sector is about equal to their total cost of research and development is an astounding finding.

This was a shock to all of us. That cost represents not only the dollar cost that comes out of the consumer's pockets, but it also means that unemployment is created as we fail to put enough money into product research and development for the future. In essence, we are undercutting the whole future of this economy through the burdensome cost of Government regulations. Recent estimates have pegged that cost at $135 billion.

If you take that $135 billion and put it into research and development, you would have economic growth that would be out pacing Japan's, instead of the other way around. Today they are the ones who are pouring the money into innovative and productive investments.

I think the Business Roundtable has performed a tremendous service by emphasizing the opportunity costs of regulation.

Mr. Chairman, I would like very much to address one subject to the members of the committee. We have a 30-day referral coming up after Judiciary Committee finishes their markup in a couple of weeks. I would hope that we could meet as a committee to talk about cutting that time down as much as possible. I know this bill, of which I am a cosponsor along with many other of my colleagues in the Senate, is a perfect vehicle for me to hang my own bill on regulatory sunset.

I have decided, however, not to put it on this bill if it in any way would endanger the timeframe or cause a delay. I think the less controversy we have on this bill the better. What we need is fast movement to get to the crux of it, and with 80 members of the Senate cosponsoring it, we ought not to have too much trouble on the Senate floor. We have passed regulatory reform legislation before. The House sits over there and does nothing about it. The best we can do is get it through here quickly and then see that we get some activity over in the House.

One of the principal problems will be whether or not we are going to try to put a legislative veto provision on this bill. That is a very highly controversial situation. I myself would resist it with every ounce of energy I have. I think it would be a monster. We have gone into detail on this. If we can possibly keep this bill as clean as possible perhaps we can develop a consensus on the committee and move this through as quickly as possible. Could you comment from the standpoint of the business community and the acumen you have developed as to what is necessary to take and get a bill through the House? Will speed in our movement here, along with strong consensus, help in this process? Instead of merely talking about this, we are doing something about it. Don't you think it's best to have the legislature work on it rather than have all the work coming unilaterally from the executive branch?

Mr. OPEL. Thank you very much, Senator, for your comments. I can only say I endorse them entirely. I believe it is important that the bill be treated with speed and, of course, I do agree that the legislative veto provisions do have certain controversy with them. I believe that there are ways to deal with that issue through separate legislation or by attaching it to the underlying statute where appropriate.

I am not able to enlarge or say much more than what you said.

Senator PERCY. Just a few quick questions on the legislation as it now stands. S. 1080 basically takes a current practice with respect to regulatory cost analysis, strengthens it, and codifies it into law. Have you found specific instances where regulatory cost analyses as conducted today by Federal agencies have in fact caused agencies to choose better and less costly regulations? I maintain when we started this process with the bill Senator Ribicoff and I introduced, the very fact that we required these analyses would probably cause agencies, once they looked at those figures, to just stop issuing many regulations. Do you feel it would be, in a sense, self-policing?

Mr. OPEL. I do, indeed, Senator. I believe it would be self-policing. I think also that the President's task force operating under Vice President Bush, has made public information concerning rules that have been improved by virtue of that analyses.

Senator PERCY. With respect to the Bumpers amendment, James Miller, executive director of President Reagan's task force on regulatory relief, in testimony before the Judicial Committee last month, suggested limits on the so-called Bumpers amendment. Specifically, he said that elimination of some legal presumptions suggested in the Bumpers amendment, particularly those related to procedural regularity and statutory interpretations of technical and scientific provisions in an agency's own rules, "could create needless uncertainties and litigation." Do you share Mr. Miller's concern about the expanded role of the Federal courts under the Bumpers amendment?

Mr. **Opel**. I do, sir. The Roundtable task force believes there should be limited review for some procedures. First of all, the new procedures should only be applied to major rules. Second, not all of these standards of judicial review need be applied in the review of the new procedures for major rules, essentially what Mr. Miller said.

Senator **Percy**. I have a final question that I would like to ask for Mr. Opel's judgment on. Later this week, I intend to introduce legislation requiring sunset reauthorization of major Federal regulatory agencies under a 10-year repeating schedule.

This type of system, I believe, would allow Congress to go beneath individual agency rules and reform the underlying congressional statutes enacted over the past 94 years which direct agency actions.

When I originally introduced it, the cosponsor of it was then majority leader Senator Robert Byrd, who had done such a great task in working with us on our budget reform bill.

Senator Chiles, who has been the father of sunset legislation, is going to join as principal minority cosponsor of this legislation that we will introduce soon.

Do you agree that this type of sunset review of regulatory statutes must be a core element of any emerging regulatory legislation passed by Congress. That is as a package, not necessarily, as I say, on this pending bill, but at some point we ought to have some way to end the regulations and to review them periodically so they don't just stay on the books indefinitely as so many things in government tend to do.

Mr. **Opel**. I do, indeed, Senator. I am speaking now for myself. In the sunset philosophy, I don't believe it is a controversy at all. I think the philosophical idea of sunset is not only right, I believe it is not controversial. Further———

Senator **Eagleton**. I would like to note my dissent on that issue. It is egregiously controversial. Probably as dumb an endeavor as this Congress has produced.

Mr. **Opel**. I obviously am mistaken.

Senator **Rudman**. He is just a very vocal minority.

Senator **Percy**. Not controversial in the business community of which I still consider myself a part.

Mr. **Opel**. I have been out of Missouri too long, I suppose. I should go back there a little more often. At any rate, I do support sunset.

Senator **Percy**. Thank you very much.

[The following letter was subsequently received by Senator Roth from Mr. Opel:]

International Business Machines Corp.,
Armonk, N.Y., July 1, 1981.

Hon. William V. Roth, Jr.,
Chairman, Governmental Affairs Committee,
U.S. Senate, Washington, D.C.

Dear Senator Roth: In reviewing the transcript of the hearing held by the Senate Governmental Affairs Committee on June 23, 1981, regarding S. 1080, I find that I misunderstood a question asked by Senator Percy on the subject of judicial review. I understood Senator Percy to have asked about The Business Roundtable's position on judicial review of compliance with the new procedures mandated by S. 1080. Upon reading the transcript, however, I realize that he was referring instead to the proposed amendments to the standards of judicial review in the Administrative Procedure Act (Section 706).

As I noted in my testimony, the Roundtable does believe that there should be limited review for the new procedures for major rules. However, we are not in agreement with Mr. James Miller's position on the "Bumpers Amendment." As stated in our testimony, we strongly support the "Bumpers Amendment" which would refine the judicial review provisions of the Administrative Procedure Act (APA) in order to help prevent potential agency abuse of the rulemaking process. S. 1080 accomplishes this objective by amending Section 706 of the APA in three respects. First, it directs a reviewing court to set aside an agency rule when the factual basis for that rule lacks substantial support in the rulemaking record. Second, it requires agencies to show that their rulemaking actions are within the scope of the authority delegated to them by Congress. Third, it makes clear that when deciding questions of law, courts should not entertain any presumption for or against the validity of agency action.

Taken together, these revised standards of judicial review will guard against the types of abuse that can arise when an agency is left free to determine the scope of its delegated authority. The result should be a more careful and conscientious approach to rulemaking by all agencies. Thus, we do not share Mr. Miller's concern that this provision will create needless uncertainty or litigation.

I would appreciate the inclusion of this letter in the official hearing record.

Sincerely,

JOHN R. OPEL.

Senator RUDMAN. Thank you, Senator Percy. Senator Levin?

Senator LEVIN. First of all, Mr. Opel, you indicated that regulatory analysis requires economic data and estimates, scientific facts, estimates and hypotheses, risk estimates and various other kinds of knowledge, theory and even educated guesswork, and assessments with which I would concur. In order to obtain that economic data, estimates, all those other facts and data, would you support agencies having access to the books and records of industry in confirming their cost estimates?

Mr. OPEL. Senator, I think there is a question of how data is aggregated, how it is identified and I believe that it is possible to protect confidentiality and still get useful economic analysis which does require industry participation, but I don't think we should abandon analyses without trying to get very specific on how we would protect that confidentiality, how we would collect the data and what aggregates, et cetera.

I don't think it is an insurmountable problem.

Senator LEVIN. You made reference to protecting confidentiality in your statement. Is that the reference you were making? It wasn't clear as to what material you would consider to be confidential. Was that business records?

Mr. OPEL. Yes, sir.

Senator LEVIN. So is your general approach that business records should be made available to the agency but they should be protected in some way, they should be kept confidential in some way, is that your general position?

Mr. OPEL. Yes, sir, and I believe that is possible. I think there are certain records that business would prefer, and there are very specific cases where business would prefer not to do that, yet they will be able to come up with an alternative to the specifics that would not be an invasion of their confidential or proprietary information. I think we already face that today in many such regulatory agencies and are able to deal with them.

Senator LEVIN. You have indicated some support for strong centralized management of this process and pointed out the grant of how OMB, under the Executive order, is given the veto power over regulation. Regulations can bounce back and forth from agency to OMB interminably unless there is some kind of a congressional deadline on it.

A proposed rule goes, without any public notice, to the OMB. OMB's comment is not made public under the Executive order, apparently. This can go back and forth for a long period of time. I am one who thinks there should be some centralization, but I am greatly troubled by allowing the OMB to have such a massive impact on the rulemaking process without making the public in any way aware of what that impact is. We can have a proposed rule which comes out of an agency, a particular interpretation of a statute, which is sent to OMB, and OMB, because of whatever reasons—it could be tremendous political pressure on the White House—could simply veto that, send it back to the agency and say send us another proposal and that could never be known to the public under this Executive order.

I am troubled by a grant of power that broad to the OMB which is not required to have any public manifestation of the results. I think we ought to know and make public at least what the comments of the OMB are on the regulations submitted to it.

This, by the way, has nothing to do with who the President is or Director of OMB is. This is a matter of principle. Could you comment on that?

Mr. OPEL. Sir, I share your concern of a process that is designed to entrap or, in fact, just delay and do nothing else. I am not really that competent to know exactly how the details of the Administrative Procedures Act would override that or how this bill could or would resolve your concerns.

I don't have any problem with any perfection of the process that renders it explicit, creates a rulemaking file that is in fact public so people can examine it. One misgiving I have is that confidentiality is dealt with in a certain way; that certain useful information is created and is protected as best as possible. We are talking about rulemaking, major rules, and seeing that the procedure that is followed in major rules is, in fact, rendered in disciplined fashion, render explicit in the rulemaking files so the underlying basis of the decision is there for everyone to see. Given that philosophy, we certainly would not object to the kind of notice or whatever procedure is useful to protect the potential abuse you describe.

Senator LEVIN. The confidentiality that you made reference to is the confidentiality of businsess documents?

Mr. OPEL. Proprietary business information.

Senator LEVIN. You are not under that group including comments from the OMB to the agency.

Mr. OPEL. No, sir.

Senator LEVIN. Thank you, Mr. Chairman.

Senator RUDMAN. Senator Eagleton?

Senator EAGLETON. Thank you, Mr. Chairman.

On this subject of major rules, Mr. Opel, I am somewhat concerned about limiting the number of major rules in light of the cost of regulatory analyses. I believe if we are overly ambitious in the number of regulatory analyses that we require, we will either create an unacceptable drain on agency resources that will detract from other important agency functions or lead the agencies to divide analytical resources between too many rules, perhaps generating cursory or useless analyses because they are simply overburdened.

In light of that, let me ask a question or two, if I may.

Are you at all troubled by the possibility that if, as you advocate in your testimony, a Presidential designee has the power to designate rules as major under some amorphous standards, such as "a disproportionate impact on individual industries," too many rules could be designated as major? Would the Roundtable favor reasonable limitations on the power to designate rules under this section? For example, a limit on the total number of rules that could be so designated?

Mr. OPEL. I think the attempt, as a matter of fact, is the use of the term "major" itself and is designed to set some criteria so we wouldn't be embroiled in trivia. Whether or not there are better ways of stating that, I think we would be very willing to look at ways to do that. But to simply set a number, Senator, I think would be a mistake. It is not clear to me there is any reason to expect in any given year 100 is right or 50 is right. The attempt is to try to define those kinds of rules that will have significant impact on the economy or significant impact on an industry or geographical areas which could be offset by some other action, potential action—tax relief or something like that.

That language is designed to limit rather than to extend and we support limited judicial review rather than introduce judicial review of everything, to get to the heart of the problem you describe.

Senator EAGLETON. I take your answer to mean you do recognize that a problem could exist if we so overburden this new system that would be generated by pending legislation, that it falls of its own weight; that is it has to be used prudently and at times cautiously so as not to overburden the system; and that we should not make it either a useless exercise or a delaying tactic.

Mr. OPEL. That is correct, Senator, although I really have a little difficulty with the idea that cost-benefit analyses is a new idea.

Senator EAGLETON. I didn't say it was a new idea. We are utilizing it, though, in a "new system," a new methodology insofar as this regulatory reform bill is drafted.

Is the Roundtable concerned that the bill's provision governing review of existing rules might be overambitious in requiring that all existing major rules, which could number into the hundreds or maybe even the thousands, be subjected to regulatory review within a timeframe ranging from between 10 and 15 years?

That is what the proposed bill seems to contemplate.

Mr. OPEL. I don't feel competent to react to that, sir. I didn't understand the bill to specifically say that.

Senator EAGLETON. We are talking about reviewing existing major rules—the provision starts on page 43 of the bill.

Mr. OPEL. My staff reminded me. I don't think that is unreasonable, Senator. Periodic review of existing rules that are also only major rules.

Senator EAGLETON. Yes, but under the three-part major rule test set out in the bill there could be some agencies where there are already in existence hundreds, I presume maybe even thousands of major rules in place. How are they going to be subjected to careful, orderly review within the kind of timeframe the bill contemplates?

Mr. OPEL. Senator, I don't know how many such rules there are. I don't believe there are that many major rules in existence. At least that provision, I don't think, contemplated that kind of quantity. Therefore, the timeframe doesn't seem unreasonable.

Senator EAGLETON. One final area: the question of cross-examination. In your prepared testimony you state, "We, therefore, support the requirement of S. 1080, that the use of oral legislative-type hearings be expanded in the case of major rules with reasonable opportunity for cross-examination of witnesses to resolve material issues of fact."

In May 1979, several legal scholars working for the Administrative Conference of the United States completed a major study of the most extensive experimentation with cross-examination to date. They examined the so-called Magnuson-Moss hybrid rulemaking procedures conducted by the Federal Trade Commission over the past couple or several years. Here are some of the conclusions that this task force of the Administrative Conference drew. I would like your comments on them.

One, they concluded cross-examination was a major cause of the voluminous hearing transcripts, some of the transcripts numbering as many as 110,000 pages—110,000 pages!—that we are amassed in various trade regulation procedures. To quote directly from the study, section VI, page 6, "The great majority of hearing time consumed in seven rulemakings that were studied was spent questioning witnesses. In the aggregate more than three-fourths of the transcripts were devoted to cross-examination."

Does that finding of this task force give you any cause for concern?

Mr. OPEL. Let me respond, Senator, to that. I am not familiar with this study.

Senator EAGLETON. I wasn't either until my staff gave me this.

Mr. OPEL. I might say, first of all, we are talking about hybrid rulemaking as it relates to major rule. Not every rule, just major rules.

Second, the intent of that is to render explicit and to check the validity of fact, to get facts straight and at the same time some of us have seen what gets to be undue delay and extension of decisions by virtue of cross-examination, having been involved in some litigious affairs in our life.

So we are not trying to introduce excessive delay into the system. I don't feel comfortable commenting on the study. I have with me here Mr. King of the firm of Wilmer, Cutler and Pickering who is counsel to our task force.

If you like, I can ask him if he would like to comment.

Senator EAGLETON. Sure. In asking this question, I should observe, I guess, no company on Earth would know more about drawn-out protracted hearings than your company.

Hence, a transcript which in some instances before the FTC runs 110,000 pages, three-fourths of which was devoted to cross-examination, can give you some idea of the prolonged and protracted nature of a hearing that includes unrestricted cross-examination. Go ahead, Mr. King.

Mr. King. Thank you, Senator. I think our feeling is that we can't tell you that the FTC experience has been a successful experience. We agree that the kind of results you are pointing to in that study are something we would like to see avoided.

We think it can be avoided and we think the experience of other agencies with these legislative-type hearings in some of which there is limited questioning or cross-examination indicates that it can be done very successfully. It has happened, for example, for quite a while at both the Occupational Safety and Health Administration and at the Environmental Protection Agency. In both cases, there are hearings. The OSHA hearings are probably very well-known.

The *Benzene* case, for example, had hearings that extended for about 2 to 3 weeks and helped develop the record in a way we believe, and I think even the agency will probably tell you, help simplify and expedite the final resolution of a very complicated proceeding. It happens at numerous agencies and the bill we have before us today is one that explicitly provides for the agencies to impose reasonable restrictions on the right of cross-examination to insure the proceeding is not unduly delayed.

The FTC experience, we believe, was a little bit unique. The trade regulation rulemaking procedures were, in a sense, a substitute for what had been an adjudicatory type process. We think it wasn't developed in the right manner. The more typical case, we believe, would be something such as what has happened at OSHA or EPA.

Senator Eagleton. I am not familiar myself with how successful or unsuccessful the experiences with respect to cross-examination has been at either OSHA or EPA. I think we will want to inquire of them for their comments on this specific issue of cross-examination. I ask leave to put their comments whenever we receive them in the record, Mr. Chairman.

[The following letter with an enclosure was subsequently received from Mr. Opel:]

International Business Machines Corp.,
Armonk, N.Y., July 14, 1981.

Hon. William V. Roth, Jr.,
Chairman, Committee on Governmental Affairs,
U.S. Senate, Washington, D.C.

Dear Senator Roth: At the June 23 Governmental Affairs Committee hearing on the Regulatory Reform Act (S. 1080), there was considerable interest expressed in two issues closely related to the bill. Senator Rudman referred to the implications of the Supreme Court's recent decision in the *Cotton Dust* case on the economic analysis requirement in S. 1080. Senator Eagleton expressed concern that the Federal Trade Commission's problems with the Magnuson-Moss hybrid rulemaking procedures would be repeated in other agencies if the hybrid provisions of S. 1080 were enacted.

I asked Wilmer, Cutler & Pickering, counsel to The Business Roundtable Task Force on Government Regulation, to prepare the enclosed legal memoranda on these issues. I would appreciate their inclusion in the official hearing record.

Sincerely,

John R. Opel.

Enclosure.

MEMORANDUM ON THE COTTON DUST CASE

(American Textile Manufacturers Institute, Inc. v. *Donovan)*

At the Governmental Affairs Committee hearing on June 23, 1981, Senator Rudman raised the question whether the Supreme Court's recent decision in the *Cotton Dust* case (*American Textile Manufacturers Institute,* v. *Donovan,* No. 79-1429) may cast serious doubt on the existence of congressional authority to require that cost-benefit analysis be utilized in the regulation of potentially life-threatening substances or instrumentalities. We do not believe that the *Cotton Dust* decision raises any such question.

For one thing, the Court's decision expresses no opinion whatsoever on whether it is desirable, as a matter of policy, to utilize cost-benefit analysis in the regulation of life-threatening substances or instrumentalities. Indeed, cotton dust itself is not a life-threatening substance and was not regulated as such. Strictly speaking, all that the Supreme Court held in the *Cotton Dust* case is that one particular statute, the Occupational Safety and Health Act of 1970, does not require that cost-benefit considerations be taken into account in setting standards limiting occupational exposure to toxic substances—whether or not those substances are life-threatening. The Court did not specifically address the question whether the Occupational Safety and Health Act permits OSHA to engage in cost-benefit analysis when promulgating such a standard. Consequently, OSHA may still be free to utilize cost-benefit analysis when it chooses to do so.

But even if the Court had decided that the Occupational Safety and Health Act prohibits the use of cost-benefit considerations in setting standards under the Occupational Safety and Health Act, such a decision would be limited to the particular statute that the Court was construing. It would not encompass other regulatory statutes. And it certainly would not indicate that there is any constitutional restriction that precludes Congress from requiring the use of cost-benefit analysis in the areas of health, safety and environmental regulation, whether or not life-threatening questions are presented. To the contrary, the *Cotton Dust* decision appears specifically to approve the application of cost-benefit criteria in any case where Congress finds it to be appropriate. Thus, the court approved the use of cost-benefit analysis by the Consumer Product Safety Commission, which has responsibility for the regulation of life-threatening instrumentalities.

In short, we do not believe that the Supreme Court's *Cotton Dust* decision calls into question Congress' authority to require that cost-benefit considerations be taken into account in any regulatory context. And we believe that, when applied with appropriate flexibility, cost-benefit analysis is a useful aid to decision-making in all areas of regulation.

MEMORANDUM ON THE FTC'S EXPERIENCE WITH THE MAGNUSON-MOSS HYBRID RULEMAKING PROCEDURES

At the June 23, 1981 hearing, Senator Eagleton called attention to a May 1979 study for the Administrative Conference of the United States ("ACUS") finding that the FTC had not implemented successfully the hybrid rulemaking procedures of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act in the promulgation of trade regulation rules. Senator Eagleton was particularly concerned about the relevance of the FTC experience to the limited opportunity for cross-examination provided by S. 1080 in major rulemaking proceedings.

We believe the FTC experience under Magnuson-Moss is irrelevant for a number of reasons.

First, S. 1080's provisions on hybrid rulemaking are carefully limited to assure that they will not result in undue delay. The bill would add only two additional procedural requirements—informal oral presentations and cross-examination on material issues of fact which cannot be resolved by other procedures. These rights are also subject to reasonable control by the agency "to ensure an orderly and expeditious proceeding." And S. 1080's hybrid procedures apply only to major rules—a very limited universe.

In contrast, the Magnuson-Moss procedures apply to all FTC rulemaking proceedings dealing with unfair or deceptive acts or practices. An opportunity for cross-examination is provided on material issues of fact even where other procedures to resolve those issues are available. And judicial review under Magnuson-Moss is based on a "substantial evidence" test that is more demanding than the "substantial support" requirement of the Bumpers Amendment embodied in S. 1080. For these reasons, there is no basis for extrapolating from the FTC experience to the proposal in S. 1080.

Moreover, the unfavorable FTC experience—as ACUS' June 1979 Report to Congress makes clear—was due not to inherent problems with the Magnuson-Moss procedures, but rather to faulty implementation of those procedures by the agency. Specifically, ACUS found that the Commission's rulemaking notices did not adequately set forth the basis for the proposed rule. This made it difficult for interested parties to ascertain what material was being relied on by the Commission and to identify significant disputed issues of material fact requiring cross-examination. To make matters worse, parties were required to designate disputed issues of material fact prematurely, thus leading to overly broad and vague designations. In these circumstances, it was not surprising to find that no real effort was made to limit cross-examination at the hearing to defined issues as contemplated by the statute. The agency simply had not defined the material issues of fact in dispute.

These deficiencies in the FTC practice need not be repeated at the FTC or elsewhere. In part, they stemmed from the fact that many of these trade regulation rulemakings were engrafted onto earlier cease-and-desist order investigations which were not structured to fit a hybrid mold. They also were attributable to the fact that the FTC Bureau of Consumer Protection, which has not had responsibility for large-scale, policy-oriented rulemaking investigations in the past, lacked the personnel, traditions and resources necessary to conduct such proceedings successfully. Finally, as ACUS itself recognized, many of these problems were corrected as the FTC staff gained experience in utilizing the new procedures.

The ACUS report, in short, shows that the FTC has improved and needs to improve more in implementing the Magnuson-Moss hybrid procedures. It does not stand as an indictment of those procedures. Indeed, while making 15 recommendations for improvements by the FTC, ACUS made no recommendation for a change in the statutory requirements for oral presentations and cross-examination.

Senator EAGLETON. Let me continue with you then, Mr. King, a little bit further with this Administrative Conference study of the Magnuson-Moss procedure before the FTC. The study goes on to point out that despite a statutory limit on cross-examination rights—and under the FTC Magnuson-Moss procedure that is described as a limitation to "issues of material fact" a standard, I take it, fairly similar to the one in S. 1080—the task force found that the limitation was "virtually impossible to apply with any measure of consistency in the midst of the hearings."

That is section VI, page 41, of the task force study. They conclude that there were virtually no controls placed on the lines of questioning that participants could conduct. Would you comment on that finding of the task force?

Mr. KING. Once again, I think the FTC experience is not one that we would endorse. We think that it can be avoided. I think in part it results from the nature of the issues involved in trade regulation rulemaking proceedings which are a kind of substitute for what had been more in the nature of adjudicatory matters in the past—where the facts involved, the questions involved, often tend to relate more specifically to particular companies and particular individuals. In that kind of a proceeding as opposed to the more typical legislative type proceedings we are talking about in informal rulemaking, you might very well have a series of issues that seem to lend themselves to endless cross-examination. So we think in part the nature of the issues on the trade regulation rule provision were different and in part we don't think it was well done by the FTC.

That doesn't mean it can't be well done by other agencies or even by the FTC themselves, particularly in the situation of a more traditional informal hearing and subjects.

Senator EAGLETON. I recognize that a hearing before the FTC under Magnuson-Moss is perhaps of a different type in scope than a hearing before EPA or OSHA on some proposed standard that they are about to promulgate. Yet I wonder whether, if the statutory limitation on cross-examination has not worked successfully in the FTC Magnuson-Moss context and if we are incorporating virtually that same limitation in this bill, we shouldn't take a second look to see that a more appropriate limitation be enacted than just borrowing the one from the FTC that hasn't worked—at least in the opinion of this task force.

Mr. KING. If I might comment for 1 minute, I think one of the most elaborate and certainly at the time thought to be one of the most important rulemaking proceedings that a health-environmental agency conducted in recent years, was OSHA's cancer policy hearing which was to develop a generic approach to regulating carcinogens which would presumably be applied more broadly than simply to OSHA itself.

For that proceeding OSHA lined up a very elaborate and lengthy witness list involving people from the United States, from Europe and elsewhere. They were attempting to do a very thorough job. I won't comment on the results, but I do want to talk for 1 minute about the process. In addition, of course, industry groups, labor groups, environmental groups had their witnesses that they wanted to put on. It was a very, very lengthy series of witnesses.

And under OSHA proceedings, there is an opportunity for the kind of cross-examination by interested parties that S. 1080 would provide—what the agency did in that case—where they recognized, even if there were no questioning, just the witnesses' statements themselves would take a long time—was to establish procedures to try and group people together.

There were a wide variety of industry groups. What the agency did was say there is a labor interest group, business interest group and environmental interest group. We are going to say to you people: Group yourselves together and you decide who you want to be your spokesman, representative, and we will allow him 15 minutes, half-hour, to ask questions, and then we will go to the next group, the labor group and then to the environmental group. If we feel we have additional time for the witness—who might be scheduled for half a day—when the other groups are finished, we will go back to the first group and let them ask additional questions if they have any.

That procedure seemed to work very well. People seemed to develop the issues as they wished. The witnesses were not put upon unduly and the record was developed in that way. I don't want to comment on the substantive results of that proceeding but the process itself was one I found to be satisfactory to both the parties, the agency, and witnesses and this was one of the most complicated proceedings that I think we have seen in recent years.

Senator EAGLETON. I will take your word for that and we will inquire, as I said, as to how successful this cross-examination business works at OSHA and EPA.

In the hearing you just described—and we won't get into the substantive merits of that hearing—I presume that a large part of the testimony was from so-called expert witnesses. Environmentalists had their researchers, professors, what have you; industrial groups had theirs, et cetera. That is rather typical of some of these hearings, is it not?

Mr. **King**. Yes.

Senator **Eagleton**. It is that conflict in expert testimony that this task force concludes does not lend itself very well to cross-examination. Here is what the task force concludes about the utility of putting on one set of technical, scientific witnesses, and then another set and then cross examining them both: "Where probing factual matters was used, the results were disappointing." The study concluded, "it is not clear that cross-examination provides the best method for structuring an oral exchange with experts. Other less adversarial hearing formats might produce a better record on matters of expert opinion." That is the task force at pages 82 and 83. Would you comment on that?

Mr. **King**. Yes, I would be happy to. In the first place, as we see S. 1080, it accommodates itself to those kinds of concerns. The cross-examination provision is one, which as we understand it, is to be invoked by the agency only when they believe other methods for developing the record or eliciting factual information would not be completely appropriate and wouldn't really do the job. So under S. 1080, if you do have the kind of issue, even if it is a material issue of disputed fact, if you have that kind of issue that can be adequately examined through other means than cross-examination, S. 1080 allows that to occur.

Cross-examination is a procedure of last resort under S. 1080, as we understand it.

So far as the usefulness of cross-examination in getting to the bottom of disputes between scientific experts is concerned, I would like once again to refer to experience I have had in a different OSHA proceeding. That is the proceeding for the development of OSHA's benzene standard. In that case OSHA issued an emergency temporary standard on the basis of a study that had been done by scientists, on epidemiological study. OSHA interpreted that study to indicate that leukemia cases had been caused by benzene exposures in the neighborhood of 15 parts per million which was a very much lower figure than any other study had ever shown.

At the hearing in that case, the Government scientists who performed the study took the stand as witnesses, they gave their testimony, and they were questioned by people from industry and others as to what their study showed, how it was conducted and what significance you could attribute to it. As a result of that hearing and that questioning, OSHA had to retreat from its initial belief that leukemia had been caused by these relatively low exposures to benzene.

As one of the authors of the study said under questioning, anyone who interpreted the study, the way OSHA had interpreted it, would be going off the deep end. In part as a result of this questioning, I think, the standard that OSHA adopted was overturned in court.

Senator **Eagleton**. Thank you, Mr. King. Thank you, Mr. Opel.

Senator **Rudman**. We thank you both very much for your testimony this morning. We found it helpful. Thank you very much.

[Mr. Opel's prepared statement follows:]

PREPARED STATEMENT OF JOHN R. OPEL

Mr. Chairman and Members of the Committee:

Thank you for this opportunity to present the views of The Business Roundtable on regulatory reform issues, including S. 1080, the Regulatory Reform Act of 1981. The Roundtable is an association of some 200 chief executive officers of companies in all fields, founded in 1972 to examine public issues affecting the economy and to develop positions reflecting sound economic and social principles.

The Roundtable's involvement in regulatory reform efforts dates back to 1974, and, as you know, The Roundtable worked very closely with members of the Senate Governmental Affairs Committee and their staffs in last year's drive to pass a satisfactory regulatory reform bill.

Throughout this time, we have made it clear that members of the Roundtable, as responsible leaders of the business community and as citizens, remain fully committed to such national objectives as achievement of a healthy environment and a safe workplace. We certainly understand that some regulation is required to ensure that these objectives are achieved. At the same time, it is also quite clear to us, as it has become clear to others, that the explosion of regulatory activity which occurred during the last 15 years has had certain unintended and undesirable results.

Costs have turned out to be far higher than anticipated -- both direct costs and such indirect costs as those resulting from losses in productivity, delays in construction of new plants and equipment, sacrifice of employment and profit-making opportunities, and so forth. Moreover, as regulatory targets become tougher, these costs tend to rise enormously. Accordingly, the economic burdens associated with regulation have been increasing.

The direct costs of regulation were examined in a major study commissioned by the Roundtable, which was performed for us by the well-known accounting firm, Arthur Andersen & Co. We announced the results of that study in March 1979 shortly before this panel held the first congressional hearing on agency-wide regulatory reform legislation.

We would like to review the main points of the study here.

The study measured the direct incremental costs of regulation -- that is, costs over and above expenditures that would have been incurred in the absence of regulation. It covered just 48 companies, six regulatory agencies or programs, and only the costs incurred in a single year, 1977. No attempt was made to measure indirect costs or costs reflected in the price of goods or materials purchased from outside vendors. No attempt was made to project the results for the 48 companies to the economy as a whole. Thus, as was explained at the time, the study revealed only the tip of the iceberg.

Nonetheless, the costs included in the study amounted to $2.6 billion or more than 10 percent of the total capital expenditures of the 48 companies in 1977, 15.5 percent of their net income after taxes, and 43 percent of their total research and development expenditures. Copies of the study are available to you if you desire them.

Over the years, as mounting costs of regulation became an increasing cause of concern, the Ford and Carter Administrations each made attempts to ensure that economic considerations were taken into account in the regulatory process. President Reagan, in Executive Order 12291, has continued and significantly strengthened these efforts. The establishment of the Cabinet-level Task Force on Regulatory

Relief, under Vice President Bush, and the consolidation of oversight responsibility in the Executive Office of the President likewise strengthened prior structures designed to ensure high-level attention to major regulatory issues.

We also welcome the specific deregulatory steps which the Reagan Administration has taken, including the suspension of certain proposed regulations and the withdrawal of those rules which were not justified on a cost-benefit basis; the postponement of certain other pending regulations to allow incoming administrators to get up to speed on their responsibilities; and the initiation of detailed reviews of certain major existing regulations. Without attempting to voice a judgment on each of the rules which have been or will be scrutinized in this fashion, the process is certainly consistent with the reform effort we believe is required.

The Business Roundtable also supports efforts to reexamine the standards and the procedures embodied in the enabling statutes of specific regulatory programs. Such attention is clearly necessary.

We continue to believe, however, that across-the-board regulatory reform legislation is needed:

- First, to codify the principles embodied in President Reagan's Executive Order,

- Second, to apply them to the independent regulatory agencies as well as those directly under the aegis of the Executive Branch, and

- Third, to enact other needed reforms to the rulemaking process and standards of judicial review, which cannot be put into effect by Executive Order.

Because we believe that these changes should be mandatory, not discretionary, we think they should be embodied in statute to ensure that the present determination to establish and maintain a system of checks and balances in the regulatory area does not come and go with the political tides.

We believe that S. 1080 represents a significant improvement on previous legislation designed to deal with regulatory reform issues, and we hope you will agree with that judgment. The bill would send a clear and permanent signal to the regulatory community that Congress intends regulatory actions to be taken only after careful consideration of the costs as well as the benefits of major rules proposals -- that it intends, in other words, for the overall impact of regulation on our economy and our society to be taken into account.

The Roundtable believes that the legislation should embrace three basic areas of reform. First, some measure of central oversight of actions by all regulatory agencies should be established to ensure that the procedures mandated by Congress and by the President are followed, and to minimize conflicting or duplicative regulation from agency to agency. Second, major rules should be required to undergo a regulatory analysis and to meet cost-benefit and cost-effectiveness standards. In addition, the procedures employed by agencies in major rulemaking activities should be modified in certain respects. Finally, the standards of judicial review of agency actions should be strengthened to prevent abuse through rulemaking of powers delegated by the Congress. I will amplify each of these points.

First, on the subject of Executive Branch management:

A measure of centralized oversight and enforcement of major rulemaking procedures is necessary to ensure that individual agency actions are consistent with requirements imposed by this legislation and by Executive Order, and to make certain that they do not conflict with other rules and with other national priorities. Without such a mechanism, the so-called "runaway fourth branch of government" is a constant possibility.

President Carter acknowledged this need when he established two organizations -- the Regulatory Analysis Review Group, which provided independent cost assessments of a limited number of major regulations pending at the agencies, and the Regulatory Council, which assumed responsibility for coordinating regulatory activities to help minimize unnecessary costs and burdens on the non-Federal sector.

President Reagan has vested somewhat broader authority in the Task Force on Regulatory Relief and the Office of Management and Budget. His Executive Order charges them with key oversight and enforcement responsibilities over Executive Branch agencies.

As indicated earlier, we are strongly of the opinion that this kind of central management is necessary. We believe that the structure developed by the Reagan Administration to manage the regulatory apparatus is an excellent one as far as the Executive Branch agencies are concerned.

We support the amendment developed by the Senate Judiciary Subcommittee on Regulatory Reform, in consultation with this committee, that would confirm the oversight and managerial authority of the President, or his designee, over independent and dependent agencies. We would not favor assigning the authority directly to the Office of Management and Budget or providing statutorily for the interagency task force. Though these arrangements appear to be working quite well in the Reagan Administration, we feel that every President should be free to make whatever managerial arrangements he considers most appropriate.

The crucial point is that the President or his designee should be clearly empowered, as in the revised bill, to ensure compliance by the agencies with the provisions of this legislation, particularly those relating to the designation of a rule as a major rule and the performance of regulatory analyses.

Second, Regulatory Analysis and Agency Rulemaking Procedures:

The Roundtable believes that certain rulemaking procedures should apply equally to both the independent agencies and those within the Executive Branch. The single most important reform is the regulatory analysis requirement for major rules. We fully support the provisions of S. 1080 which require agencies to identify and assess the costs and benefits of all proposed major rules, as well as to examine the cost-effectiveness of reasonable alternative approaches which would achieve the same regulatory objectives. The cost of regulation should be weighed in determining both the stringency of regulation and the means used to achieve the desired results. It is equally important that, unless precluded by law, agencies should adopt major rules only (1) when the potential benefits of the rule justify the potential costs and (2) where the alternative selected is the most cost-effective approach that will substantially achieve the rulemaking objectives.

In our view, cost-benefit analysis is a method for achieving a reasonable balance between the benefits of regulation and the costs incurred in realizing those benefits. Cost-benefit analysis makes explicit the trade-off between the expenditure and the regulatory objectives.

We must achieve a balance between regulatory goals and our ability, as a nation, to bear the costs of achieving those goals. Given the state of our economy and the unalterable fact of economic scarcity, we cannot afford to divert resources to regulatory goals in an inefficient manner.

The regulatory analysis requirement contained in S. 1080 is entirely practical. While it employs measurement techniques where feasible and useful, regulatory analysis is not an exact measurement process, and it need not be so in order to be a valuable decisionmaking tool. Rather, it is an estimating process designed to provide comparative information about expected outcomes on both the costs and benefits. The analysis needs to be done as carefully as possible, of course, but precise, exact numbers are not essential to the usefulness of the assessment.

As we envision it, regulatory analysis is simply a technique for providing decisionmakers with information they must have as a basis for intelligent judgment. That information includes economic data and estimates; scientific facts, estimates and hypotheses; risk estimates, and various other kinds of knowledge, theory and even educated guesswork. It is a mistake, in our opinion, to get hung up on questions of whether benefits can be reduced to numbers or whether costs can be calculated with precision or whether the claims of contending parties can be trusted. No one should expect that regulatory analysis will provide neat mathematical answers to complex regulatory questions. To some degree, estimates and projections must remain speculative; they necessarily involve qualitative input, whether that input is summarized mathematically or expressed verbally.

What is being recommended is simply a process for marshalling and analyzing information. The process is, in fact, a familiar one. Congress requires such information and makes use of it every day, recognizing the imperfections of estimates. The Executive Branch requires and uses such information. Business requires and uses such information. We simply do not see how requiring such analyses, as part of the judgmental process involved in developing major rules, can possibly be questioned on any logical basis.

S. 1080 acknowledges appropriately that all costs and benefits cannot be reduced to numbers. Agencies will remain free to exercise their judgment; but they should be required to do so on the most fully informed basis possible.

In summary, the approach embodied in S. 1080 has the following advantages:

- First, it imposes a needed economic discipline on the regulatory process by requiring cost-benefit and cost-effectiveness analyses for all major rules.

- Second, it allows Congress to continue to determine legislatively whether or not cost-benefit and cost-effectiveness considerations are appropriate decision criteria in a particular regulatory area. Where Congress views these considerations as inappropriate, their employment for decisionmaking purposes can be excluded -- as is currently the case under the Delaney clause of the Food, Drug and Cosmetic Act and under the primary ambient air standard provisions of the Clean Air Act. However, regulatory analysis will enable Congress to make its determination on the basis of greater knowledge about the tradeoffs involved when excluding cost considerations from the decision process.

- Third, it realistically reflects the state of the art in regulatory impact analysis. Cost-benefit and cost-effectiveness analysis are valuable tools which can facilitate rational decisions about allocation of the nation's scarce economic resources. But they are not intended as a mechanical substitute for public policy decisionmaking; they are tools to assist the decisionmaker in his task.

We agree with the Judiciary Subcommittee that the regulatory analysis provisions of S. 1080 should be embodied in a separate chapter of the Administrative Procedure Act. That would minimize the possibility of creating uncertainty with regard to law that has developed under the APA for the last 35 years.

We concur with the provisions of S. 1080 requiring a regulatory impact analysis for all rules which impose compliance costs having an annual impact on the economy of $100 million or more. We also favor a provision by which other rules could be selected for regulatory analysis either by the agencies or by the President.

We also support the requirement for a regulatory analysis for rules that impose less than a $100 million annual impact, but which have a disproportionate impact on individual industries, specific geographic areas or different layers of government, or that have a significant adverse impact on competition, productivity or employment.

We think agencies should be required to explain the basis for their determination that a rule is or is not "major" under the $100-million standard. An explanation should also be provided when a rule is designated as "major" under other criteria. As amended by the Regulatory Reform Subcommittee, S. 1080 requires such an explanation only when the determination is made that a rule is or should be designated as "major."

It is equally important for agencies to explain -- even if very briefly -- why they have concluded that a particular rule does not qualify as "major" under the $100-million standard. This relatively simple exercise will serve to increase public confidence in the rulemaking process and establish a necessary predicate for the limited judicial review that we also favor.

For regulatory actions predicated on scientific findings, we believe the President or his designee, in consultation with the Office of Science and Technology Policy, should determine how to improve the quality and objectivity of the science base for regulatory action.

We support the requirement of S. 1080 that major rules be reviewed periodically, and be repealed or modified if it is found that they are no longer cost-effective or that their benefits fail to justify costs.

We also agree with provisions of this legislation requiring publication of semiannual agendas of all regulatory actions under consideration. This process seemed to work reasonably well during the Carter Administration. It imposes discipline on the agencies to examine their entire rulemaking activity periodically and to indicate areas of possible regulatory excess, conflict or duplication.

Also at the agency level, we feel that current requirements under the Administrative Procedure Act do not satisfactorily reflect the extent to which informal rulemaking has become a principal vehicle for complex and far-reaching government regulation. Accordingly, our view is that the bare-bones notice and comment requirements are insufficient for major rules. We therefore support the requirement of S. 1080 that the use of oral, legislative-type hearings be expanded in the case of major rules, with reasonable opportunity for cross-examination of witnesses to resolve material issues of fact. And we concur with the limitations on judicial review approved by the Regulatory Reform Subcommittee.

We also support the concept of requiring the agency to place in the rulemaking file material that is relied upon in promulgating a final rule, whether or not the rule is a major rule.

In establishing rulemaking procedures, it is essential to strike an appropriate balance between the right of interested persons to comment on information relied on by the agency and the need to bring rulemaking procedures to a close without endless rounds of comments every time a new item of information is brought to the attention of the agency. We believe that the Regulatory Reform Subcommittee revision properly strikes that balance by requiring agencies to provide interested persons an adequate opportunity to comment on all material placed in the file before the close of the comment period and on any factual or methodological material of central relevance to the proceeding that is received by the agency after the normal comment period has expired. This approach to the handling of material received after the close of the normal comment period recently was approved by the United States Court of Appeals for the District of Columbia Circuit in Sierra Club v. Costle.

One issue regarding the rulemaking file which we believe has not been adequately addressed in S. 1080 is the question of confidential material. Here too, there is a need to strike a balance between the legitimate confidentiality concerns of persons submitting information to the agency and the public interest in being able to comment on any material on which the agency substantially relies in adopting a rule. We recommend, therefore, that confidential material be maintained in a separate file that is not open to the public. However, if the agency plans to rely substantially on confidential material, the substance of such material should be made available for public comment through the use of summaries, aggregations of data or other appropriate mechanisms.

Some members of Congress have questioned whether these reforms may not overburden and delay the rulemaking process. The answer is that they may cause some delays but not that much. The new procedures apply for the most part only to major rules, not to the bulk of agency rulemaking activity. Major rules, on the other hand, already require extended consideration because of the importance of the public policy issues involved; a minor additional delay is a small price to pay for improving the process and guarding against significant misallocation of resources.

With regard to the suggested changes in informal rulemaking procedures, legislative-type hearings, both with and without cross-examination, are already used by many agencies. They do not appreciably lengthen the rulemaking process. Many such hearings consume less than a single day. Even those that are the most protracted rarely extend for more than one to three weeks. This was even true of OSHA's benzene standard, one of the most controversial rulemakings of recent years. In a rulemaking that will frequently consume more than a year from start to finish, an additional couple of weeks certainly does not represent significant delay. Indeed, the clarification of issues and the testing of evidence in oral hearings is like to enhance the agency's understanding of the subject, which may actually expedite rather than lengthen the decisionmaking process.

Finally, on the subject of Judicial Review:

A number of people who support the imposition of new procedures for major rules are concerned about subjecting agency compliance with these requirements to judicial review. They fear that the process will become overly judicial or that policy decisions will be shifted to the courts. The Roundtable believes that the concerns are overstated; they misconceive both the need for limited judicial review and the role that the courts would play in such a process.

We share these basic concerns. This does not mean, however, that agency compliance or noncompliance with the most important reforms embodied in the new legislation should be completely immune to judicial oversight. For, without at least some judicial protection, we could find that implementation of these critical congressional objectives is left largely to the whim of each individual agency.

In our view, courts should be empowered to review--on a limited basis--three important aspects of agency compliance with the new procedures and requirements.

- First, courts should have some role in ensuring that agencies do not short-circuit the regulatory analysis process by refusing, without justification, to treat a proposal as a major rule.

- Second, courts should have some role in ensuring that agencies do not make cost-effectiveness and cost-benefit claims that cannot be justified on the basis of the full record of the rulemaking proceeding.

- Third, courts should have some role in ensuring that agencies do not unjustifiably deny interested persons procedural rights that are essential to a fair resolution of issues central to the rulemaking proceeding taken as a whole.

So far as regulatory analysis is concerned, the foregoing objectives can be achieved if courts are authorized to set aside major rules where a failure or inadequacy in an agency's application of the $100 million standard or its compliance with the cost-effectiveness or cost-benefit requirements makes the resulting rule arbitrary and capricious or leaves it without substantial support in the rulemaking record viewed as a whole. This approach would focus the courts upon the end result of the regulatory analysis and would preclude courts from second-guessing agencies on policy judgments that properly lie within the agencies' domain.

A parallel approach could be taken with respect to review of the oral hearing and cross-examination procedures established in the legislation. Courts would be authorized to set aside a rule only if the agency's failure to afford particular procedures have precluded fair resolution of a central issue in the rulemaking taken as a whole. This change has been incorporated by the Judiciary Subcommittee in their latest draft.

We also favor improvements in the standards of judicial review under Section 706 of the Administrative Procedure Act. Some of the problems of the current regulatory system derive from ill-defined congressional mandates, abuse by the agencies of delegated authority, and undue deference accorded to agency determinations by some courts.

Congress, of course, can remedy part of the problem through clearer and more specific delineations of agency authority in the underlying organic statutes. Passage of deliberately vague language in the expectation that the regulators will fill in the gaps has long been a serious problem, as you are aware. However, the general standards of judicial review also need to be refined in order to help prevent potential agency abuse of the rulemaking process.

S. 1080 accomplishes this objective by amending the judicial review provisions in Section 706 of the Administrative Procedure Act in three principle respects. First, and most importantly, it directs a reviewing court to set aside an agency rule when the factual basis for that rule lacks substantial support in the rulemaking record. Second, it requires agencies to show that their rulemaking actions are within the scope of the authority delegated to them by Congress. Third, it makes clear that, when deciding questions of law, courts should not entertain any presumption for or against the validity of agency action.

Taken together, these revised standards of judicial review will guard against the types of abuse that can arise when an agency is left free to determine the scope of its delegated authority. The result should be a more careful and conscientious approach to rulemaking by all agencies.

That concludes my comments on S. 1080. In your letter of June 14, Mr. Chairman, you also asked for our views on S. 344, the Agency Accountability Act, sponsored by Senators Levin, Boren and others. This is one of a number of proposals that have been made for a legislative veto over agency rulemaking activities. We understand Congress' concern about the agencies' exercise of delegated authority. Legislative veto may well be appropriate in some individual circumstances for specific agencies. However, the Roundtable cannot support an across-the-board legislative veto. There are important constitutional questions involved, valid concerns about politicizing the rulemaking process, and substantial disagreements among sponsors of competing veto proposals. Accordingly, we urge the committee to refrain from adding S. 344 or any other legislative veto proposal to S. 1080. The issue is better addressed either in separate legislation or during consideration of individual enabling statutes.

Mr. Chairman, that completes our statement on the key issues. Before inviting your questions, I want to make it clear that the Roundtable does not favor the imposition of impractical procedures on Federal regulatory agencies. We do not want to tie knots in the regulatory process. We only want to restore appropriate checks and balances in the process.

I want also to reiterate that The Business Roundtable considers regulatory reform to be a key element in the drive to restore American economic growth and productivity. We urge you to enact a comprehensive regulatory reform bill like S. 1080, and we stand ready to assist you and your staff in any way we can.

Senator RUDMAN. The next witness before the committee this morning is Milton Socolar, Acting Comptroller General, accompanied by Arthur Corazzini and Mark Nadel of the Program Analysis Division of the GAO.

If I mispronounced any of your names, I apologize.

We are, as you can well imagine, running against some time constraints today. We value your testimony but would appreciate very much if you could summarize your statements as briefly as possible and then we will have some questions.

TESTIMONY OF MILTON J. SOCOLAR, ACTING COMPTROLLER GENERAL, GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY ARTHUR CORAZZINI AND MARK NADEL, PROGRAM ANALYSIS DIVISION

Mr. SOCOLAR. I have a detailed appendix to my statement which I understand will be inserted in the record and I will run through my prepared testimony briefly as you request.

There are several points that we would make with respect to S. 1080. At the outset, the GAO strongly supports the concept of regulatory agencies comprehensively assessing the effects of proposed and existing rules. S. 1080 in our estimation constitutes a marked improvement over previous bills in that it focuses more directly on the central issue of regulatory analysis and provides a better definitional framework.

The first point that we would make is with regard to that definitional framework. The criteria defining a major rule specify as major those rules which have an effect on the economy of $100 million in compliance costs, those which result in a substantial increase in other costs or prices throughout the economy and those which produce significant adverse economic effects.

The scope of the coverage of the bill, however, may be too inclusive. I understand that the administration desires authority to exempt proceedings which provide "regulatory relief." Without such waiver authority, the administration fears that its deregulation program would be delayed.

We agree that economic deregulation and other regulatory reforms could be delayed undesirably by being included under the umbrella of this legislation. We also agree that provision should be made to avoid that result. We do not agree, though, that an open-ended grant of authority to exempt major rules on an ad hoc basis is the best approach. If waiver authority is to be granted, it should be under specified criteria.

Actions that reduce regulatory burdens but which nevertheless might generate significant adverse consequences or substantial cost increases to segments of the population should still be thoroughly analyzed.

We suggest, therefore, that waiver of the requirements for detailed regulatory analysis be authorized for rules which diminish the extent of regulation imposed but only where a substantial body of evidence shows a high likelihood of net gain without serious adverse consequences.

The criteria in S. 1080 for estimating the costs and benefits of regulations do not explicitly include consideration of the effects attributable to interacting regulatory requirements, those situations where the very compliance with the requirement in one area introduces the necessity for compliance with another set of regulations. Because such effect may not be readily apparent, we would suggest that the committee consider calling specific attention in its report on the bill to the need for care in this regard.

With regard to the likely impacts of S. 1080, there is no doubt that the regulatory analysis requires a substantial commitment of resources. The cost of doing regulatory impact analysis under existing requirements has varied greatly, as has the quality.

Since executive branch agencies are already required to do rigorous regulatory analysis under Executive Order 12291, one would think that agencies would incur little additional cost under the provisions of S. 1080. But because the analytic requirements are somewhat greater and compliance is likely to be better, increased costs should be expected.

The level of compliance with regulatory analysis requirements prior to Executive Order 12291 was not uniform. Also, independent regulatory agencies exempt under the Executive order would be covered by this bill. Except for the inclusion of the independent regulatory agencies under the bill, we cannot state whether the cost impacts of the bill would be significantly greater than under the Executive order as its implementation process.

We are not able to project across the board the capacity of agencies to absorb these costs while meeting their other responsibilities. However, it is clear that additional funding will be required by a number of agencies or they will have to reprogram existing budgets.

In addition to cost impact, it must be expected that regulatory analysis adds time to the rulemaking process. The amount of time will depend on the complexity of issues treated and on the way in which agencies are organized to do their analyses. Agencies with adequate analytic capacity to expedite analysis of critical junctures will not experience significant delay in the issuance of rules. Agencies lacking sufficient analytic resources will experience delay.

Usually, the time for additional analysis is time well spent. However, delay in the issuance of rules, particularly in cases that are time critical, such as seasonal narketing rules of the Department of Agriculture, could introduce an undesirable instability in the regulated industries involved. While the emergency rule provision in the bill specifically provides for time-critical situations, the normal regulatory process to some agencies will likely be extended.

Turning to section 4 of the bill, just as the projected effects of proposed regulations should be analyzed, so too should the current effect of existing rules be evaluated in the light of experience and changing circumstances. Your concern, however, that section 4(a) which requires agencies to review all major rules every 10 years may be too rigid. This requirement could pose a substantial and even crippling burden on the agencies. Reviews of existing rules as contemplated in this legislation are as complex and costly as the analyses of proposed rules. The National Highway Traffic Safety Administration recently estimated the cost of evaluating one of its rules at $1.5 million. EPA has completed a recent review of an existing rule at an approximate cost of $350,000. No one appears to know how many rules would have to be analyzed. The number could be unmanageable. For example, OSHA has cognizance over thousands of consensus standards. We would, therefore, suggest that some flexibility be added to assure that agencies are not overcome by the rate of review provided in the bill.

At this point, I would emphasize that delay and expense in doing analysis are not just burdens or problems for the agencies. Regulations are designed either to redress or avoid a specific harm in the public interest. While the regulatory clock is ticking, sectors of society and the interest of the public will suffer their own regulatory burden should unwarranted delays encumber the process.

Regulatory analysis should not go beyond what is necessary to make informed policy decisions.

Finally, I would like to address an important administrative issue. Proposed section 553(e)(3) of title V prohibits anyone other than a full-time agency employee from preparing regulatory analyses. Other sources can be used for only the gathering of information. This provision may have a substantial negative impact on the ability of agencies to implement the legislation, resulting in worse rather than better regulatory analysis.

There often is not a clean line between the gathering of information and those activities which will have to be done by four full-time employees. For example, contractors are now used to project effects, using their own models, such as air quality or economic models. Is this data gathering or is it analysis? Whatever it is called, it is frequently essential to the analysis. Also preparation of an analysis often requires individuals with specific expertise which may not reside in an agency for various reasons.

Consultants can be useful in filling these needs. While there is no question but that policy decisions must be firmly in the hands of agency officials, it is my judgment that this provision of the bill could well pose problems for the agencies.

I would close by saying Federal regulation is necessary to the achievement of national aims, but regulation carries a price in the burdens it opposes to achieve those aims, a price which must be considered if we are to regulate intelligently and I would commend this committee for the initiative it has taken to address this, among other important issues, associated with the Federal regulatory process.

Senator **Rudman**. Thank you, Mr. Socolar. If I could take just one small bit of your testimony, I think what you are telling us this morning, is that if we are not careful, regulating regulators is going to cost a great deal of money and take a great deal of time. That is really the essence of what you have been saying?

Mr. **Socolar**. Yes, but one has to consider under the current Executive order, a good bit of a procedure provided for in S. 1080 is already being implemented and I would not wish to suggest that S. 1080 in and of itself would overly significantly increase costs above what the administration is now accomplishing.

Senator **Rudman**. Under the Executive order.

Mr. **Socolar**. Under the Executive order.

Senator **Rudman**. Senator Durenberger has a number of questions he wants submitted for the record and we will submit those to you for answer.

Senator Eagleton?

Senator **Eagleton** I, too, comment, as do you, Mr. Chairman, that regulating the regulators can be a costly process and I underscore Mr. Socolar's prepared testimony where he points out that the Environmental Protection Agency cost per analysis ranges from $33,000 to $1.2 million. The range at OSHA was $40,000 to $750,000, et cetera.

Also, as he points out in his testimony, in analyzing S. 262, a prior regulatory reform bill reported by this Committee, the Congressional Budget Office estimated additional costs for the regulatory agency of between $10 and $20 million. So I think when we begin to mark up this bill, we have to focus on this facet of the cost factor as well.

As I tried to point out with Mr. Opel, the previous witness, we should not so overburden the process or make it so overly expensive that we are acting in a self-defeating way.

Mr. **Socolar**. I would just like to make one comment before leaving. That is what we would not wish to imply that these costs of the regulatory process outweigh the benefits that we see in a firm, structured way of measuring the cost versus the benefits of the regulations that Government agencies do promulgate.

We think that is a very, very important issue as encompassed in S. 1080.

Senator **Eagleton**. I take that point as having been made. When you talk about a firm, structured way on costs and benefits, I trust you will admit that it sometimes isn't as firm and structured when yov get into questions of the value of human life, which we will go into with he next witness. It isn't like punching some magical number into the computer and getting an automatic answer out hat is all truth and wisdom. It is not that firm and not hat structured, I take it. Is that your view?

Mr. **Socolar**. That is correct.

Senator **Rudman**. Thank you very much.

[Mr. Socolar's prepared statement (with an attachment), letter to Senator Eagleton, and responses to written questions submitted by Senators Roth and Durenberger follow:]

PREPARED STATEMENT OF MILTON J. SOCOLAR

Mr. Chairman and Members of the Committee:

I am pleased to be here today testifying on S. 1080, the proposed Regulatory Reform Act.

The GAO strongly supports the concept of regulatory agencies comprehensively assessing the effects of proposed and existing rules. S. 1080 in our estimation constitutes a marked improvement over previous bills in that it focuses more directly on the central issue of regulatory analysis and provides a better definitional framework. There are, however, a number of specific items which we would like to bring to the Committee's attention.

Sections 2, 3, 4, and 7 of the bill require that agencies prepare detailed analyses of proposed major rules to ensure that projected benefits justify the costs imposed; that agencies review existing major rules every 10 years; and that there be published semiannual regulatory agendas and a regulatory calendar announcing upcoming regulatory proceedings.

The criteria defining a major rule specify as major those rules which have an effect on the economy of $100 million in compliance costs; those which result in a substantial increase in other costs, or prices, throughout the economy; and those which produce significant adverse economic effects. Certain classes of rules are specifically exempted from this definition. Together with the Regulatory Flexibility Act, the bill captures most situations where major analytical effort should be required. The scope of this coverage, however, may be too inclusive. I understand that the Administration desires authority to exempt proceedings which provide "regulatory relief." Without such waiver authority, the Administration fears that its deregulation program would be delayed.

For example, the Interstate Commerce Commission has been proposing rules that will reduce its control over surface transportation. The analysis currently being done in conjunction with these rules is less complex than that contemplated by S. 1080. The more complex analysis called for by the bill could well increase the time required to implement these regulatory initiatives.

The Environmental Protection Agency is projecting at least $200 million in compliance cost savings resulting from pending rule changes designed to provide for greater overall efficiency in the control of air pollution. Detailed analysis as called for by S. 1080 could slow down these initiatives also.

We agree that economic deregulation and other regulatory reforms could be delayed undesirably by being included under the unbrella of this legislation. We also agree that provision should be made to avoid that result. We do not agree, though, that an open ended grant of authority to exempt major rules on an ad hoc basis is the best approach. If waiver authority is to be granted, it should be under clearly specified criteria. Actions that reduce regulatory burdens but which nevertheless might generate significant adverse consequences or substantial cost increases to segments of the population should still be thoroughly analyzed. We suggest, therefore, that waiver of the requirements for detailed regulatory analyses be authorized for rules which diminish the extent of regulation imposed, but only where a substantial body of evidence shows a high likelihood of a net gain without serious adverse consequences.

Section 7 seeks to enhance the coordination of agency regulatory actions by requiring that each agency publish a semiannual agenda of rules under development and that the President or his designee publish a semiannual calendar of major rules under development. This section would legislatively mandate requirements similar to those covered under E.O. 12291 and its predecessor E.O. 12044. The agendas and calendars have been effective tools in coordinating the activities of regulatory agencies with each other and the public.

As requested, we have furnished the Committee a prepublication copy of our report on conflicting and overlapping regulations and the need for regulatory coordination. We did not find significant problems of regulatory conflict and overlap. For the most part the problems can be readily resolved through refinements in the implementation of Executive Order 12291 and the requirements of the bill under consideration.

The criteria in S. 1080 for estimating the costs and benefits of regulations do not explicitly include consideration of the effects attributable to interacting regulatory requirements--those situations where the very compliance with the requirement in one area introduces the necessity for compliance with another set of regulations. Because such effects may not be readily apparent, we would suggest that the Committee consider calling specific attention in its report on the bill to the need for care in this regard.

The Chairman requested that we analyze certain likely impacts of this legislation based on the preliminary results of our ongoing review of the regulatory analysis process. Our estimates of impact should be regarded as tentative.

There is no doubt that regulatory analysis requires a substantial commitment of resources. The cost of doing regulatory impact analysis under existing requirements has varied greatly, as has the quality. At the Environmental Protection Agency, costs per analysis ranged from $33,000 to $1.2 million. The range at OSHA was $40,000 to $750,000. The Office of Surface Mining of the Department of the Interior spent $800,000 on one analysis that supported a series of rules. Food and Drug Administration and Consumer Product Safety Commission costs have ranged between $27,000 and $130,000.

Since executive branch agencies are already required to do rigorous regulatory analysis under Executive Order 12291, one would think that agencies would incur little additional cost under the provisions of S. 1080. But, because the analytic requirements are somewhat greater and compliance is likely to be better, increased costs should be expected. Independent regulatory agencies exempt under the Executive Order would be covered by this bill. The level of compliance with regulatory analysis requirements prior to Executive Order 12291 was not uniform. Except for inclusion of the independent regulatory agencies under the bill, we cannot state whether the cost impacts of the bill would be significantly greater than under the Executive Order as its implementation proceeds.

Cost increases should be least for those agencies such as EPA which are accustomed to sophisticated regulatory analysis. In analyzing S. 262, a prior regulatory reform bill reported by this Committee, the Congressional Budget Office, prior to the promulgation of E.O. 12291, estimated additional costs for the regulatory agencies at between $10 and $20 million. We have no better estimate to offer.

We are not able to project across the board the capacity of agencies to absorb these costs while meeting their other responsibilities. However, it is clear that additional funding will be required by a number of agencies or they will have to reprogram existing budgets.

In addition to cost impact, it must be expected that regulatory analysis adds time to the rulemaking process. The amount of time will depend on the complexity of issues treated and on the way in which agencies are organized to do their analyses. Agencies with adequate analytic capacity to expedite analysis at critical junctures will not experience significant delay in the issuance of rules. Agencies lacking sufficient analytic resources will experience delay. Usually, the time for additional analysis is time well spent. However, delay in the issuance of rules in some cases that are time-critical, such as seasonal marketing rules of the Department of Agriculture, could introduce an undesirable instability in the regulated industries involved. The emergency rule provision in the bill provides for time critical situations.

Just as the projected effects of proposed regulations should be analyzed, so too should the current effects of existing rules be evaluated in the light of experience and changing circumstances. We are concerned, however, that Section 4(a), which requires agencies to review all their major rules every 10 years may be too rigid. This requirement could pose a substantial and even crippling burden on the agencies. Reviews of existing rules as contemplated in this legislation are as complex and costly as the analyses of proposed rules. The National Highway Traffic Safety Administration recently estimated the cost of evaluating one of its rules at $1.5 million. EPA has completed a recent review of an existing rule at an approximate cost of $350,000. And no one appears to know how many rules would have to be analyzed; the number could be unmanageable. For example, OSHA has cognizance over thousands of consensus standards. We would, therefore, suggest that some flexibility be added to assure that agencies are not overcome by the rate of review provided in the bill.

At this point, I would emphasize that delay and expense in doing analysis are not just burdens or problems for the agencies. Regulations are designed either to redress or avoid a specific harm, in the public interest. While the regulatory clock is ticking sectors of society and the interest of the public will suffer their own regulatory burden should unwarranted delays encumber the process. Regulatory analysis should not go beyond what is necessary to make informed policy decisions.

Finally, I would like to address an important administrative issue. Proposed Section 553(e) (3) of Title 5 prohibits anyone other than a full time agency employee from preparing regulatory analyses. Other sources can be used for only the gathering of information. This provision may have a substantial negative impact on the ability of agencies to implement the legislation, resulting in worse rather than better regulatory analysis.

There often is not a clean line between the gathering of information and those activities which must be done by full time employees. For example, contractors are now used to project effects using their own models, such as air quality or economic models. Is this data gathering or is it analysis? Whatever it is called, it is frequently essential to the analysis. Also, preparation of an analysis often requires individuals with specific expertise which may not reside in an agency for various reasons. Consultants can be useful in filling these needs. While there is no question but that policy decisions must be firmly in the hands of agency officials, it is my judgment that this provision of the bill will pose problems for the agencies.

In closing, I especially want to commend this Committee for the initiatives it has taken to address the issues associated with the Federal regulatory process.

Appendix

On April 21, 1981, Chairman William Roth asked the GAO to provide the Committee on Government Affairs with the preliminary results of GAO's study on regulatory analysis. Specifically, he requested that we address the following:

1. What is the potential cost of cost-benefit analysis in delay and additional expense to the agencies, including additional expense for outside consultants?
2. To what extent will the proposed bill interfere with President Reagan's program to deregulate the economy, assuming there is no exemption for deregulatory rulemaking proceedings?
3. What will the proposed section mandating a 10 year regulatory review cost agencies in terms of time and expense and to what extent will it distract them from their primary statutory responsibilities?
4. How do agencies develop cost-benefit assessments? What information sources do they rely upon?
5. How well did independent regulatory agencies comply with President Carter's Executive Order (12044) requiring regulatory analysis?

This appendix provides more detailed answers to those questions, which are answered in a more summary fashion in the text of the testimony.

Methodology

Our data have been gathered from eleven different regulatory agencies and executive departments, including the following:

1. U.S. Department of Agriculture (Agriculture Marketing Service; the Agriculture Stabilization and Conservation Service; and the Food Safety and Quality Service).

2. U.S. Department of Commerce (the National Marine Fisheries Service).
3. U.S. Department of Energy (Economic Regulatory Administration; and the Office of Conservation and Renewable Energy).
4. Department of Health and Human Services (Food and Drug Administration).
5. U.S. Department of Labor (Occupational Safety and Health Administration).
6. U.S. Department of the Interior (Office of Surface Mining).
7. U.S. Department of the Transportation (U.S. Coast Guard; and the National Highway Traffic Safety Administration).
8. Environmental Protection Administration.
9. Consumer Product Safety Commission.
10. Federal Communications Commission.
11. Interstate Commerce Commission.

We chose these agencies because the executive agencies have previously done the largest number of regulatory analyses, and we felt that their experience would be most useful in assessing the problems with regulatory analysis likely to be encountered by the agencies for whom regulatory analysis would be required by S. 1080. We interviewed officials in each of these agencies and sought answers to the Committee's questions. We also received copies of three or more of the most recent regulatory analyses done by each regulatory office at which we interviewed. In addition to examining executive agencies, we interviewed officials at three independent agencies to attempt to determine S. 1080's effect on these agencies. Two of these agencies (the ICC and FCC) are not required to perform regulatory analyses, while the CPSC is so required by statute.

Our findings are based upon these interviews and upon our examination of these regulatory analyses. We have not independently corroborated the estimates of administrative costs given us by the agencies.

Administrative Costs

The projection of costs of performing cost-benefit analyses in compliance with the requirements of S. 1080 is inexact but it is nevertheless possible to derive estimates of those costs based on previous analyses which have been required under Executive Order 12044 and 12291. Because there is not enough experience under E.O. 12291, which was issued only last February, the cost figures we have assembled are for the most part analyses pursuant to the previous Executive Order. For the reasons we discuss below, the impact of this legislation will probably be greater.

Our survey has focused on the costs identified and reported by selected agencies for performing regulatory impact analyses under E.O. 12044 during the calendar years 1979 and 1980. Economic Economic impact analyses are not a homogeneous product, and agencies interpreted the requirements variously. Therefore, average cost figures are less meaningful than they would be for more homogenous products.

Most regulatory agencies (independent and executive branch agencies alike) presently utilize analysis as a means of rule development. The rulemaking process involves such functions as product demand estimation, engineering studies which model alternative means of industry compliance, and so on. Clearly, data acquired in the course of rule development is useful in the analysis process. Cost figures reported to GAO reflect the difficulties encountered in attempting to disaggregate the incremental costs of compliance with E.O., 12044 from other analytic requirements and overall rule development. Agencies have been encouraged to combine various analytic functions, e.g., Regulatory Flexibility Analyses, Environmental Impact Analyses, as well as various analyses required by agency authorization legislation.

Since executive branch agencies are already required to perform regulatory analyses under E.O. 12291, for which guidelines have been issued, they should incur little or no incremental cost for analysis. However, either under E.O. 12291 or under this legislation, those analysis costs will be higher than before because the analytic requirements are greater and OMB now has the authority to enforce compliance. The independent agencies will probably incur increased costs in being required to comply with the analysis requirements of S. 1080, whereas their compliance was both partial and voluntary under the executive orders.

In addition, S. 1080 requires that more explicit consideration be given to the benefits of regulatory actions in relation to costs. Under E.O. 12044 the mandate for most of the regulatory analyses performed by agencies in our survey is given below. Regulatory analyses were required to:

> 'contain a succinct statement of the problem; a description of the major alternative ways of dealing with the problems that were considered by the agency; an analysis of the economic consequences of each of these alternatives and a detailed explanation of the

> natives and a detailed explanation of the reasons for choosing one alternative over the others.' (E.O. 12044, sec. 3(b)(1)

In effect, Executive Order 12044 required a cost-effectiveness analysis of the regulatory alternative chosen by the agency. In contrast, sec. 7 of S. 1080 requires major rules be accompanied by a statement of basis and purpose which includes:

> 'a description and comparison of the benefits, costs, and adverse effects of the rule; and...a reasonable determination...that the benefits of the rule justify the costs and adverse effects of the rule...'

These are heavier analytic requirements and will probably increase agencies' costs.

We have not attempted to estimate the aggregate impact of the bill in terms of total costs imposed upon agencies. The Congressional Budget Office has responsibility for estimating the cost impact of legislation, but no cost estimates for this legislation have been prepared as yet. Data issued by the CBO in 1980 in conjunction with S. 262, a bill with similar analysis requirements estimated that the additional cost to the government for regulatory analyses and management would be $10 to $20 million. Depending on the number of regulations promulgated, this is based on an average cost of $100,000 per regulatory analysis and $50,000 per review of existing regulations.

Table 1 below presents our data on the costs of doing regulatory analyses for those analyses on which we have been able to obtain information. We obtained information from each agency on several of their most recent regulatory analyses. Since the process of compliance with E.O. 12044 is an evolutionary one, we believe that the most recent analyses are more representative of agency experience than those performed further into the past.

The cost data below include costs for those staff directly involved in analyzing the regulation, and also overhead costs such as processing the analysis in the agency branch responsible for that regulation, where these data were available and contract costs. In compiling estimates for the costs of regulatory impact analyses, dollar amounts were used when they were provided by agencies. In many cases, agencies provided "staff year" estimates for the cost of regulatory analyses which we coverted to dollar amounts.

The estimates below do not include all the costs of regulatory analysis. For example, the costs of reviewing the analysis outside the agency but within the executive department or outside the department at OMB or at other agencies (as part of a RARG review) were not included. We have not estimated costs to statistical agencies of providing data, nor any costs to the private sector of providing data or responding to these analyses. For these reasons, the data below are probably an underestimate of the total costs.

The agencies were able to provide us with only rough subjective judgments of the delays that would be involved. The issue of delay is covered in the statement.

Table 1

Cost Summary for Regulatory Analyses a/

Performed Pursuant to Executive Order 12044

Agency/Office	Average Cost/Reg. Analysis ($1000)	Number of Analyses	Cost Range ($1000)	Total Cost ($1000)
Department of Energy d/				
Natural Gas	617.5	1	-	617.5
Petroleum Allocation	14.6	3	6.8-29.5	43.8
Petroleum Pricing	6.2	7	2.6-10.9	43.4
Department of Commerce d/				
National Marine Fisheries Service	7.7	3	5.5-9.5	23.1
Department of Agriculture d/				
Agricultural Stabilization and Conservation Service	3.9	86	-	361.2
Food Safety and Quality Service	14.6	42	-	613.2
Agricultural Marketing Service	2.5	30	-	75.0
Department of the Interior				
Office of Surface Mining	800.0	1	-	800.0
Department of Health and Human Services				
Food and Drug Administration - completed	27.5 b/	4	-	110.0
Food and Drug Administration - in progress	81.9 b/	6	-	491.5
Consumer Product Safety Commission	130.8 a/	3	113.2-153.9	392.4

Agency/Office	Average Cost/Reg. Analysis ($1000)	Number of Analyses	Cost Range ($1000)	Total Cost ($1000)
Department of Labor				
Occupational Safety and Health Administration	338.0	5	40.-750.0	1690.0
Department of Transportation				
Coast Guard	252.0 a/	1		
NHTSA	71.5 a/,c/	2	66.0-77.0	143.0
Environmental Protection Administration				
Office of Pesticides and Toxic Substances	77.0 a/	3	33.0-132.0	231.0
Office of Planning and Management - Economic Analysis Division	38.0	2	25.0-50.0	75.0
Office of Drinking Water	816.75	2	388.5-1235.0	1633.5

a/ In computing the dollar cost of staff time, we have used the cost of a GAO staff year. Some inaccuracies may be introduced by imputing the same cost of a staff year to each agency, but this bias will not be very great.

b/ These regulatory analyses were developed using data from a contractor report to EPA, financed by the Interagency Regulatory Liaison Group.

c/ One of the NHTSA regulatory analyses costing $77,000, was performed pursuant to the new E.O. 12291.

d/ Because we were unable to obtain staff year estimates for the analyses performed in USDA, DOE, and DOC, these cost figures do not include costs of agency overhead, although they do include typing costs.

Using the above table, it is possible to estimate different costs for an average regulatory analysis. Table 2 shows three different estimates:

Table 2

Total and Average Cost Estimate for Regulatory Analyses

	Number	Total Cost	Average Cost ($)
Including all USDA analyses	166	5905.6	$35,576.0
Including only FSQS from USDA	80	5469.4	$68,367.5
Not including USDA	38	4856.2	$127,790

The USDA was a special case since regulatory analyses were performed for all regulations, major and minor, in USDA. These analyses were performed cheaply, often at the cost of a few weeks staff time only. Thus inclusion of USDA may bias our estimate of the cost of an analysis downward. The most representative figure for the cost of an analysis based on our work is probably obtained by excluding data on USDA completely. This figure is approximately $128,000.

Interference with President Reagan's Deregulatory Program

This question is addressed in the main body of the testimony.

Regulatory Review

S. 1080 "requires that each major rule that is in effect on the date of enactment of this section shall be reviewed by the agency within 10 years of the date of enactment of this section."

The impact of this provision is difficult to estimate. There are two major pieces of information required in order to judge the impact of this requirement. These are the number of rules to be reviewed, and the costs of a review.

We do not know the number of rules which could be reviewed nor has OMB calculated how many items could be reviewed under this requirement. In part, this is because it is not easy to define exactly what a single major rule consists of in terms of the existing total of regulations. There is no accepted definition of a rule for this purpose because minor rules might be grouped together in order to form a major rule, and the impacts of different regulations vary dramatically.

Under E.O. 12291, the Office of Management and Budget is responsible for monitoring executive agency performance in reviewing currently effective rules. However, because of limited experience at the present time, OMB does not now know how many rules would come up for review under E.O. 12291, although a number of existing rules are already being reviewed. On March 25, 1981, Vice President George Bush, Chairman of the Presidential Task Force on Regulatory Relief, announced a list of 27 major regulations that will be reviewed first. Cost figures on these reviews are not yet available.

Although cost figures for these ongoing reviews are not available at the present time, we have obtained cost figures for some past reviews, that were initiated before the promulgation of E.O. 12291. These figures are given below, and are subject to the same caveats as the cost figures on regulatory analyses. The agency staff years were valued at the cost of a GAO staff year, and thus include overhead. Where contractors performed parts of the reviews, the total contract cost are also added.

Table 3

Cost of Regulatory Reviews of Existing Regulations

Agency/Office	Average Cost/Reg. Analysis ($1000)	Number of Analyses	Cost Range ($1000)	Total Cost ($1000)
Department of Transportation				
National Highway Traffic Safety Administration	1500.0	1	-	1500.0
Environmental Protection Administration				
Office of Drinking Water - completed	350.0	1	-	350.0
Office of Drinking Water - estimated	200.0	1	-	200.0
Department of Health and Human Services				
Food and Drug Administration	118.3 a/	2	-	236.5

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a These figures include personnel times which included clerical overhead, and thus should be adjusted downward, but which understated staff contributions of bureau personnel, which would adjust the figures upward.

We can see from this table that reviews of existng regulations will not be inexpensive. The lowest cost figure given for a regulatory review is $200,000 and other reviews come to much more. These figures are far higher than the $50,000 figure on which the CBO estimate was based. Because no agency is now in the business of reviewing all its existing rule base, the regulatory review requirement will cost more money, but agencies vary in the extent to which they will be affected.

Some agencies, while not reviewing each single major regulation, have nevertheless begun to review overall regulatory programs. For example, DOE has issued a schedule of review of those parts of the Code of Federal Regulations which apply to it in May 1980. Another example of agency review of a complete program is EPA's Office of Mobile Source Air Pollution Control. Because the Clean Air Act is being considered by Congress, this office is reviewing its operations under the Clean Air Act. However, rather than examining any one particular rule OMSAPC is reviewing the entire thrust of its activities. This approach may be more sensible rather than tying the review to individual regulations, or parts of the Code of Federal Regulations.

In addition to agency program reviews, some particular regulations must be reviewed under individual agency statutory requirements. The major examples of this are the EPA new source performance standards and national ambient air quality standards, which both must be regularly reviewed on a 4 year and 5 year cycle according to the Clean Air Act.

The conclusions we have derived for regulatory analysis in general should also apply to regulatory review. The agencies which are now inexperienced at reviewing their own regulations may experience delays and distraction from statutory responsibilities. However, other agencies are more accustomed to reviewing regulations. For example, NHTSA has an Office of Program Evaluation which has been reviewing NHTSA regulations in the areas of automobile side impact protection, bumpers, and fuel tank integrity. EPA reviews its new source performance standards and NAAQS's regularly as mandated by law.

Sources of Information for Regulatory Analysis

A wide variety of data is necessary to do an adequate regulatory analysis. These data include scientific data, technological data, economic data, and sociological data. Although these data are necessary and desirable to regulate and to analyze regulations, there are several problems with the sources of information for these data.

There are four major problems involved in obtaining information for regulation. First, in many cases the data are not available, or are available only at a prohibitive cost. Although the Federal Government has statistical agencies devoted to data gathering, these data are often not of the same types necessary for regulatory analysis.

Secondly, there is the issue of bias in the information obtained, whether it is directly obtained from industry or obtained form consulting firms. The issue of bias has two parts. Industry sources may misrepresent the facts so as to support regulatory approach which the industry prefers. However, OMB officials do not believe that this is a problem because firms would not risk their long-term credibility. Also, to the extent that information is obtained from consultants, who also have worked for the regulated industry conflict of interest problems have been alleged.

A third issue is the problem of information being considered proprietary by the industry from whom it is desired. For example, the Department of the Interior's Office of Surface Mining (OSM) was unable to obtain industry data on the cost of coal mine recontouring because the industry regarded those data as proprietary. Some pesticide manufacturers have taken the same position on pesticide usage data which EPA feels it needs. This problem is a major constraint on information for regulatory analysis.

Finally, the problem of legislative restrictions (perceived or real) on the gathering of information may serve as a barrier in obtaining accurate data. EPA, for example, has stated that it lacks the legislative authority to gather the data it needs on pesticide usage directly from the industry. GAO, however, has disagreed with EPA's position. 1/ This problem varies by the particular agency or statute involved.

All these problems may significantly impair the ability of regulatory agencies to make informed judgments about the effectiveness of their regulatory programs. In this short survey, however, we were not able to judge the magnitude of each of these problems.

1/ Letter to the Administrator, Environmental Protection Agency, Septemter 30, 1980, (CED-80-145)

We have examined the regulatory analyses which were provided to us by the regulatory agencies which we have examined for this study, in order to determine the sources of information used in the analyses. Based on this examination, it seems that the following classes of sources provide the most information, and in approximately this order:

1. Previous government reports and analyses.
2. Consultants and contractors to government agencies.
3. Direct industry sources and consultants to industry.
4. Scientific literature.

Of course, much of the data generated from government reports and from consultants is taken from industry, but our sources in general do not reveal the ultimate source of the data. Sometimes, the regulatory analyses do not cite the sources of their information, or cite them only partially. To the extent that we have been able to identify sources, we have listed them in the following table. Rather than listing every government document or agency report going into a particular regulatory analysis, we summarized them when there were many under the heading "EPA reports," or "NMFS reports." When industry sources provided data, this was listed under "Industry provided Data" or "Industry cost Data," for example. It was not possible in general to determine to what extent this data was provided at the initiative of the industry, or at the initiative of the regulatory agency. To the extent that individual consultants are listed in our table, these are consultants

TABLE 4

List of Regulatory Analyses and Data Sources

AGENCY	REGULATORY ANALYSIS	DATA SOURCES
CPSC	Power Lawn Mowers	Batelle Columbus Laboratories National Electronic Injury Survey System Trade association journals CPSC model of costs of injuries Consumer's Union American Rental Association Outdoor Power Equipment Industry (Stanford Research Institute)
CPSC	Unvented Gas-Fired Space Heaters	A.T. Kearney, Inc., Management Consultants Industry provided data
CPSC	Cellulose Insulation	A.T. Kearney, Inc., Management Consultants Batelle Columbus Laboratories FEA/DOE reports Department of Commerce data
FDA	Patient Labeling Requirements for Drugs	Trade association and professional journals FDA reports CWPS, Council of Economic Advisors, and Health, Education and Welfare publications
FDA	PCB's in Transformers	Putnam, Hayes and Bartlett, Inc. EPA Study USDA/FSQS Study
FDA	Patient Package Inserts	Trade association and professional journals FDA reports Consumer testing Rand Corporation Contract with FDA
DOI/OSM	Permanent Regulatory Program/Surface Mining	Industry and Government publications National Coal Model Engineering cost analysis by D'Appolonia Consulting Engineers, Inc.
EPA/ODW	Trihalomethane Regs.	Industry and public interest groups Culp-Weisner-Culp report

		National Organic Monitoring Surveys Surveys by EPA's Technical Support Division Temple, Barker and Sloane report
EPA/ODW	Underground Injection Wells	A.D. Little Study Booz, Allen, Hamilton, Inc., report Geraghty and Miller, Inc., report Temple, Barker and Sloane, Inc., report
EPA	Motorcycle Noise Regulation	Motorcycle Industry Council Manufacturers EPA reports/tests SAE Sound Levels for Motorcycles U.N. Economic Council for Europe, Vehicle Noise Standards Japanese Noise Regulations Canadian Motor Vehicle Safety Act McDonnell-Douglas Motorcycle Demand Forecasting Model
USCG	Tanker Safety	DOC/MARAD reports Operations Research, Inc., report
USCG	Tank Barges	MARAD reports Automation Industries, Inc., report
EPA/OMSAPC	High Altitude Motor Vehicle Standards	Gruen, Gruen and Associates report United Bank of Denver report National Academy of Public Administration report *Automotive News* 1979, 1980 Market Data Book EPA interviews, surveys
EPA/OMSAPC	Light Duty Diesel Particulate Regulations	Industry data, comments EPA data and publications *Automotive News* CWPS Comments
EPA/OMSAPC	NPRM Gaseous Emission Regulations, Light Duty Trucks	Industry and trade association comments Federal, state and local agency comments EPA publications and RIA's EPA engineering studies *Cost Estimation for Emission Control Related Components: Systems and Cost Methodology Description*, Leroy H. Lindgrem, Rath and Strong, Inc. Society of Automotive Engineers reports: "Passenger Car and Light Truck Fuel Economy Trends Through 1980"
DOC/NMFS	California-Oregon-	Contractor reports to NMFS--Oregon State Uni-

	Washington Fishery Management Plan	versity: Socio-Economics of the Idaho, Oregon and California Coho and Chinook Salmon Industry Miles, Sherman, Gibbs and Flaherty: Atlas of Marine Use in the North Pacific Region Lent and Johnston, "The Marketing of Pacific Northwest Salmon" State Fish and Wildlife Service reports NMFS reports
DOC/NMFS	Alaska Salmon Fishery Management Plan	Gruen, Gruen and Associates: "The Economic Impact of a Humboldt Bay Salmon Release and Recapture Facility" NMFS report Lent and Johnston report
USDA/AMS	Group of 30 RIA's	USDA data, including data from Economics and Statistics Service and Foreign Agriculture Service
USDA/ASCS	Group of 8 RIA's	USDA data, including data from ESS, FAS and data from Universities and Cooperative Extension Service
USDA/FSQS	Net Weight Labelling	USDA's Economics, Statistics and Cooperative Service
USDA/FSQS	PCB's	EPA Data FSQS field inspection data
DOE	Petroleum Products Allocation (PPA) Gasohol	DOE, U.S. National Alcohol Fuels Commission, and Office of Technology Assessment reports Industry newsletters--Platt's Oilgram Price Report and Platt's Oil Regulation Report Petroleum Marketer Press reports—Articles Cited in RA Congressional Statement: Senators McGovern, Lugar, Helms, Talmadge, Stewart; Letter to Washington Post 3/11/80 Industry contractor reports--Batelle Columbus Laboratories and Radian Corporation
DOE	PPA--Motor Gasoline	DOE reports FHWA Report Informal industry data--(telephone conversations) Press report—articles in Newspapers cited in RA
DOE	Petroleum Products Pricing (PPP)--Changes	DOE data from Energy Information Administration (EIA)

	in Equal Application Rule for Motor Gasoline	
DOE	PPP—Amendment of Equal Application Rule for Refiners and Resellers	DOE data from FIA
DOE	PPP—Gasoline 'Tilt' Rule	DOE reports
DOE	PPP—Resellers and Resellers-Retailers Price Rules for Gasoline	Small Business Administration report DOE reports Concil on Wage and Price Stability and Federal Trade Commission data Industry data, trade association surveys provided during public comment period
DOE	Natural Gas Curtailment Priorities	Consultant reports—Jack Faucett Associates, Stone and Webster Mgt. Consultants, H.Zinder and Associates, Foster Associates Scientific reports DOE and Federal Energy Regulatory Commission reports Industry data provided during public comment Period--TRW Energy Systems Planning Division Report, General Motors Corporation: *A Rational Response to the Need for Natural Gas Curtailment* Electric Power Research Institute report Scientific reports—R. Turvey: *Optimal Pricing and Investment in Electricity Supply*, N.C. Telson: "The Economics of Alternative Levels of Reliability for Electric Power Generation Systems"
EPA	NSPS for Coal Fired Power Plants	EPA engineering studies ICF (Contractor) Coal and Electric Utilities Model (CEUM) EPA National Emissions Data System Industry production data
EPA	Steam-Electric Utility Effluent Limitation Guidelines	EPA Development Document for this regulation DOE Inventory of Power Plants *Electric World* and *Electric Week* *McGraw-Hill Survey of Industry Capital Spending Plans* Statistical Yearbook, Edison Electric Institute, 1978 Dow-Jones Index, Standard and Poors Index EPA developed plant simulations

EPA	Preliminary Assessment Visibility Regulations	National Emissions Data System Environmental Research and Technology report CEUM Model ICF report
EPA	Exclusive Use Amendments to FIFRA	International Trade Commission reports USDA/Economic Research Service reports Stanford Research Institute report Fortune and Forbes Magazines National Agricultural Chemical Association reports Other Federal agency reports
EPA	Guidelines for Pesticide Registration	Department of Commerce production data Trade association data EPA reports; Council on Environmental Quality and EPA Contractor reports
OSHA	Hearing Conservation Amendment--Final RA	OSHA documents and internal reports Scientific publications Census and BLS publications Center for Policy Alternatives (OSHA contractor report) EPA report
OSHA	Conveyor Standard	Bureau of Labor Statistics, Supplementary Data System Data from Materials Handling Consultants to OSHA
EPA	National Ambient Air Quality Standard--Ozone	National Environmental Data System (NEDS) EPA reports
NHTSA	Amendment to Occupant Crash Protection Std.	Cost/Benefit Study--by Dr. W. Nordhaus, economist, Yale University Automobile Sales Data and Projections provided by industry GM and Ford Surveys, Industry cost data NHTSA Automobile teardown studies Fatal Accident Reporting System (FARS) Highway Safety Research Institute studies

to the agency performing the regulatory analysis. Where industry financed studies by consultants, these are listed under "industry reports" to the extent that the specific study is not given.

Agencies often have a large variety of data bases and information available to them from their own data gathering operations. Since these sources were often not listed in the regulatory analyses, we put them under the headings "DOE data," or "EPA data." The source of these data were not usually given in the analyses.

Compliance with Executive Order 12044 by Independent Regulatory Agencies

Because independent regulatory agencies have not been subject to past executive orders on the subject of regulatory analysis, their compliance with these orders has been strictly voluntary. Our major source of information of the effect of these orders on the independent agencies, in addition to interviews with agency officials, is the OMB report Improving Government Regulation: Current Status and Future Directions, (November 1980).

There are several examples of agency compliance with E.O. 12044. In the area of regulatory review, the FCC, FTC, and SEC have reviewed many of their regulations in order to eliminate unnecessary ones and make compliance easier for small business. Also, the FTC has significantly upgraded its analysis activities. According to OMB, several independent regulatory agencies prepare asssessments of proposed regulations that are similar to regulatory analyses. In addition, the Consumer Product Safety Commission has always been subject to a regulatory analysis requirement, and thus would not be affected as much as some of the other independent agencies.

Our interviews with officials of the ICC and FCC made it clear that they viewed S. 1080 as being extremely burdensome. On the other hand, these agencies do informal analyses of regulations already, and are not starting from a position of no analysis or analytic capability.

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

PROGRAM ANALYSIS
DIVISION

B-204658
69CCPAD81

NOVEMBER 9, 1981

The Honorable Thomas F. Eagleton
United States Senate

Dear Senator Eagleton:

Subject: Approaches Toward Valuation of Human Life
By Certain Federal Agencies (PAD-82-21)

In your letter of June 19, 1981, you requested that the General Accounting Office conduct a survey of Federal agencies responsible for public health and safety in order to ascertain whether they assign a specific dollar valuation to human life and safety in analyzing program and regulation costs and benefits. You also requested the specific dollar amounts currently assigned for preventing accidents, epidemics, deaths, injuries, etc., and whether discounting to present value is used.

As you suggested in your letter and as we agreed with your office, we did not survey all Federal agencies, but have contacted those we regard as the major safety and health agencies: the Center for Disease Control and the Food and Drug Administration, both of the Department of Health and Human Services; the Department of Agriculture; the Environmental Protection Agency; the Occupational Safety and Health Administration and the Mine Safety and Health Administration of the Department of Labor; the Nuclear Regulatory Commission; the Federal Aviation Administration and the National Highway Transportation Safety Administration of the Department of Transportation; and the Consumer Product Safety Commission. Of these, we found that only Department of Transportation agencies routinely use explicit valuations of safety or health benefits in their analyses, although other agencies have occasionally done the same in the past. In certain other cases, implicit values are assigned when comparisons are made between budgetary outlays and reduced incidence of fatality, injury, or illness.

RESULTS OF OUR SURVEY OF BENEFIT-COST ANALYSIS BY GOVERNMENT AGENCIES

Our survey of a number of Government agencies with responsibility for health and safety regulation indicates that they have little in common in how they assign dollar values to premature death, injury, or illness. Our survey revealed that while most agencies do not use explicit valuations as a matter of policy, many have used such values in specific analyses. We present survey results in narrative form; the values used in these examples are less meaningful when taken out of context. The examples presented are not the product of an exhaustive survey, but were selected to demonstrate the range of values and methodologies employed by Federal agencies with health and safety responsibility.

Center for Disease Control

The Center for Disease Control has used a variety of figures as proxies for the economic costs and benefits associated with disease and disease prevention. In a study based on a program directed at eradicating measles, cost estimates were based on estimated debility and mortality rates reported to State health departments. 1/ Costs per case were based on U.S. Bureau of Labor Statistics indices on costs of various forms of medical treatment--hospitalization, transportation, physician care, custodial care, etc. The benefits per case avoided were estimated at $73 (in 1969 dollars). 2/ This figure was multiplied by average yearly reduction in cases to obtain estimated dollar savings from vaccination programs, and benefits were weighed against the costs of such programs.

The program resulted in a range of outputs including cases avoided, premature deaths prevented, cases of mental retardation prevented, physician days saved, etc. Not counting the intangible effects--pain and suffering averted, loss of association, etc.,--the real benefits of Federal Government intervention between 1966-74 were valued at $1.12 billion, and attained at an estimated cost of $108 million.

Mine Safety and Health Administration

The Mine Safety and Health Administration has used a value of $165,000 per case avoided in measuring the benefits and costs of its Respirable Coal Dust in Mines Regulation. The figure is based on compensation levels established by the 1977 amendments to the Federal Coal Mine Health and Safety Act of 1969, commonly known as the Black Lung Benefits Act, 30 U.S.C. 901 et seq.

1/Robert E. Albritton, "Cost and Benefits of Measles Eradication: Effects of a Federal Intervention," Policy Analysis, vol. 4, no. 1, 1978, pp. 1-21.

2/N.W. Axnick, S.M. Shavell, J.J. Witte, "Benefits Due to Immunization Against Measles," Public Health Reports, 84, August 1969.

The use of this figure by the Mine Safety and Health Administration cannot be interpreted as reflecting the "value" of preventing a case of black lung, nor does it imply that a case of black lung is to impose a burden equivalent to $165,000. A case of black lung will result in an economic compensation of $165,000; the benefits of preventing a case of black lung, therefore, include the saving of $165,000.

Nuclear Regulatory Commission

The NRC does not use a specific value to represent the benefits and costs of program objectives such as prevention of premature death, illness, or injury, but does assign a value of $1,000 per person-rem 1/ in estimating the effect of routine releases of radioactivity from nuclear power plants. In applying estimates from the report of the Committee on Biological Effects of Ionizing Radiation, $1,000 per person-rem translates into approximately $5 million per premature death, given the assumption that the release of 5,000 person-rems results in one statistical premature death. 2/

Department of Transportation

Agencies within the Department of Transportation (DOT)--the Federal Aviation Administration (FAA), and the National Highway Transportation Safety Administration--have traditionally used explicit values in evaluating the economic benefits and costs of accident prevention programs.

Prior to 1973, the FAA used a discounted-future-earnings approach to estimating the costs of premature death or injury. Figures of $189,000, $200,000, and $230,000 were used in various studies in 1971. Differences were primarily attributable to using different discount rates. Presently, FAA and all executive branch agencies use a 10 percent discount rate.

A 1974 study of the FAA 3/ concluded that the justification for using a discounted-future-earnings technique was either largely unexamined or rooted in the belief that an individual's contribution to the GNP was an appropriate index of his or her social worth.

1/A person-rem is the dose of ionizing radiation that causes the same effect to humans as one roentgen of x rays.

2/View of the NRC, as reported in David Okrent, "Comment on Societal Risk," Science, vol. 208, April 25, 1980.

3/Steven Rhoads, Policy Analysis in the Federal Aviation Administration (Lexington, Mass.: D.C. Heath and Co.), 1974.

Since 1973, FAA has used figures based on airline settlements of wrongful death suits. The figures used are quite similiar to the values derived by the discounted-future-earnings approach, but the change was made because the alternative source appeared more acceptable to critics. 1/

The National Highway Transportation Safety Administration did a benefit cost analysis of safety improvement projects in which annualized benefits were determined by multiplying reported accident reductions by dollar values for fatality and injury prevention. The values used for this study were $287,175 for fatalities and $3,185 for non-fatal injuries. 2/

In June 1981, the DOT adopted uniform guidelines for regulatory evaluations. The purpose of this preliminary document is to establish minimum standards for regulatory impact analyses and to provide guidance for other regulatory evaluations as well. The guidelines offer a brief description of a variety of analytical techniques and suggest a number of conventions for use in benefit-cost analyses. 3/

One of the conventions recommended for calculating costs and benefits presented in the DOT guidelines is a schedule of tentative monetary conversions (see table 1). The monetizations were derived from highway accident deaths and injuries and are based primarily on lost earnings. Since the values do not purport to reflect the intangible components of injury, disability, or premature death, the guidelines suggest that such values are to be discounted.

Consumer Product Safety Commission

The Consumer Product Safety Commission (CPSC) has responsibility for regulating a wide variety of consumer products. In its efforts to aid the consumer in evaluating the relative safety of products and to develop safety standards, the CPSC has undertaken substantial research in the area of product safety and the costs imposed by product-related accidents. Through the National Electronic Injury Surveillance System, the CPSC gathers data relevant to type and cause of injury, nature and cost of treatment, personal characteristics of victims, etc. The total cost of injuries is

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1/Ibid., pp. 82-83.

2/"An Evaluation of the Highway Safety Program," U.S. Department of Transportation, National Highway Transportation Safety Administration, July 1977.

3/Guidance for Regulatory Evaluations: A Handbook for DOT Benefit-Cost Analysis, draft, Department of Transportation, June 5, 1981.

Table 1

Department of Transporation Regulatory Guidelines
Examples of Monetary Conversions

Impact Component	Impact Measure	Tentative Estimate of Average Monetary Value per Unit of Impact ($1981)
Personal safety (highway accidents)	Fatalities	$340,000
	Critical injuries (survival uncertain)	$230,000
	Severe injuries (life threatening, survival probable)	$102,000
	Moderate injuries	$ 68,000
	Minor injuries	$ 3,400

Source: "Guidance for Regulatory Evaluations," June 5, 1981, Office of Industry Policy, Department of Transportation.

estimated for each of a variety of product types, the primary components being medical treatment and lost earnings.

The CPSC has undertaken this research and developed its injury cost model as a means of estimating the total effect of product-related injuries. Such a model is particularly useful in cases involving injuries where direct effects are short-term and costs are primarily economic and easily measurable. But for accidents involving serious injury, disability, or loss of life, measuring and placing a value on pain and suffering, degradation of functional capacity, and loss of association is more problematical. While the CPSC has undertaken research in this area and its injury cost model does employ dollar values for premature death, serious injury, etc., these values are not used by CPSC analysts as a basis of policy recommendations. Policymakers are presented with a range of values derived through techniques based on several perspectives and are free to incorporate those values which appear most appropriate.

IMPLICIT VALUATIONS

Even when policymakers do not make explicit valuations of the type discussed above prior to making a decision, the outcomes of budgetary and regulatory policymaking reveal implicit valuations. For example, the decision of the Mine Safety and Health Administration to require the use of self-rescue devices reveals such an implicit valuation. These devices cost the industry $50 million, and the regulation was based on the judgment that approximately half of the 70 lives lost in coal mine fires during the previous 5 years could have been prevented had such devices been available. The effect of such a judgment, then, is the implication that the possibility of preventing 35 premature deaths over a 5-year period is worth at least the expenditure of $50 million, or approximately $1.43 million per premature death prevented. Table 2 illustrates the range and diversity of implicit valuations revealed by selected Government programs.

USING BENEFIT-COST ANALYSIS

Your letter expressed concern regarding the use of benefit-cost analysis and discounting procedures as a means of evaluating Federal programs when these programs are aimed at preventing death, injuries, or illness. We would like to offer several brief observations. The true value of a human life or the true psychic costs of injuries or illness cannot be calculated. In short, life-saving activities cannot be compared with the attainment of other goals such as reducing travel time or costs of production.

In practice, however, decisions must be made among competing objectives and programs in safety. Thus, an agency must implicitly

Table 2

Sample Estimates of the Cost per Life Saved in Programs Supported, Operated, or Mandated by Government

Program	Cost per Life Saved (dollars)
Medical Expenditure (a)	
Kidney transplant	72,000
Dialysis in hospital	270,000
Dialysis at home	99,000
Traffic Safety	
Estimate for eliminating of all railroad grade crossings	100,000 (b)
Military Policies (a)	
Instructions to pilot on when to crash-land airplanes	270,000
Decision to produce a special ejector set in a jet plan	4,500,000
Mandated by Regulation	
Coke oven emissions standard, OSHA	4,500,000 to 158,000,000 (c)
Proposed CPSC lawn mower safety standards	240,000 to 1,920,000 (d)
Proposed standard for occupational exposure to acrilonitrile	1,963,000 to 624,976,000 (e)

Sources: (a) Dan Usher, "An Imputation to the Measure of Economic Growth for Changes in Life Expectancy" in M. Moss, ed., The Measurement of Economic and Social Performance (New York: National Bureau of Economic Research, 1973).

(b) Robert F. Baker, The Highway Risk Problem (New York: Wiley, 1971).

(c) Statement on behalf of the Council on Wage and Price Stability by Dr. John F. Morrall III, before OSHA, May 11, 1976.

(d) Comments of the Council on Wage and Price Stability before CPSC, August 15, 1977.

(e) Statement on behalf of the Vistron Corporation by James C. Miller III, before OSHA, April 4, 1978.

or explicitly place a value on the alternatives and the costs associated with them. The Congress also makes an implicit valuation of this sort when it decides which programs to authorize and the level at which to fund them. Even though benefit-cost analysis permits a formal review of the economic efficiency of alternative approaches, it does not and cannot be used to make the final decision. First, to the extent that it cannot convert benefits into dollar values, benefit-cost analysis underestimates benefits, particularly health and safety ones. Second, to the extent that it deals with the efficient or productive uses of resources and not equity in the distribution of benefits and costs, benefit-cost analysis tells the policymaker nothing about the other implications of his or her choices even within the safety program area.

Clearly, any economic calculation of the value of a human life is incapable of correctly encompassing all the psychic costs of death, illness, and suffering. On the other hand, the value of a human life does include real economic components. These economic components can be explicitly calculated and placed in the benefit-cost calculation. Those who perform these calculations are correct in assessing that to acknowledge that some values are unknowable should not be justification for avoiding any explicit enumeration and evaluation of the objectives, costs, and benefits of various programs or projects within the safety area.

When using monetizable values of life, injury, or health, account can be taken that benefits and costs do not occur in the same time periods. Budgetary resources are, of course, limited. Because those resources are productive and have alternative uses, analysts must allow that presently available resources are more valuable to us than equivalent resources at some later date. This difference in value is accounted for through the process of discounting. Benefit-cost analysis traditionally expresses the benefit and cost of programs in terms of their present discounted values--what such future costs or benefits are worth in terms of today's dollars. To the extent that the effect of human life, safety, and health program alternatives can be objectively measured and monetized, it appears appropriate to discount those values. In cases where such valuations also attempt to subjectively value the noneconomic component of life, health, or safety, the discounting process is not analytically defensible because the psychic component of loss of life, injury, or health is neither quantifiable, nor does its "value" erode, in a financial sense, with the passage of time.

At the request of your office, we did not obtain agency comments on this report. As arranged with your office, unless you publicly announce the contents earlier, no further distribution of this report will be made until 30 days after the report date. At that time, we will make copies available to others upon request.

I hope this report is responsive to your request. If we can be of further assistance, please call us.

Sincerely yours,

Morton A. Myers

Morton A. Myers
Director

GENERAL ACCOUNTING OFFICE RESPONSES TO WRITTEN QUESTIONS SUBMITTED BY SENATOR ROTH

Question 1. Can you provide us with any estimate of what S. 1080 will cost the private sector to provide the data required by agencies to do a cost benefit or cost effectiveness analysis?

Answer. We have not collected any such information from firms in the private sector, and therefore we are unable to provide a reliable estimate.

Question 2. On page three of your testimony, you refer to "interacting regulatory requirements—those situations where the very compliance with the requirement in one area introduces the necessity for compliance with another set of regulations." Please provide examples of such situations?

Answer. Our report "Gains and Shortcomings in Resolving Regulatory Conflicts and Overlaps" presents 20 cases of such situations. One example is provided by efforts by the private sector to meet the objectives of both energy conservation and environmental protection. The Department of Energy is charged with implementing the Powerplant and Industrial Fuel Use Act of 1978 whose objective is to reduce U.S. dependence on oil and gas. Under the Act, companies are required to use alternative energy sources to fuel large boilers. The best alternative is often coal, but switching to coal may increase sulfur emission into the air and, therfore, may require the installation of costly pollution control equipment in order to meet the clean air standards of the Environmental Protection Agency. Other examples are provided in detail in the appendix to our report which we have provided to the Committee.

Question 3. Did you find any evidence that agencies prepared regulatory analyses, including cost benefit studies after their decision to go ahead with a regulation had already been made? In other words, were these studies done to guide the decision making process, or were they only used to justify a decision once it was made?

Answer. We did not find any evidence that these studies simply justify decisions already made. However, we did not conduct an in-depth analysis of the stages of the decisionmaking process for the various regulatory analyses that we examined.

Question 4. Would you recommend that agency budgets be substantially increased to provide adequate resources to do these cost benefit studies if S. 1080 is enacted into law?

Answer. Aside from the independent regulatory agencies, the additional resources needed to satisfy the requirements of S. 1080 should be no greater than those to satisfy the requirements of Executive Order 12291. Under either set of requirements, agencies will need additional resources, but we are unable to say whether these can be provided successfully be reprograming or whether some agencies will need additional new funds. The situation is further complicated by budget cuts which agencies are currently being required to make.

Question 5. An adequate cost benefit analysis depends on accurate data. Do you believe that the data available in most cases is sufficiently reliable to justify the use of cost benefit analysis? More specifically, do you believe that industry can be relied upon to provide accurate unbiased data when they have a great deal to gain by exaggerating projected compliance costs?

Answer. Our interviews with regulatory agency officials indicated that in most cases the data available for cost estimates was considered to be sufficiently reliable for analytic purposes. Because in most cases the estimates of costs as well as benefits are projections of what costs will be in the future, they can not be precisely accurate. As long as allowance is made for the uncertainty of the numbers, however, this should not be an insurmountable problem.

With regard to the problem of bias in the data, data is usually available from a variety of sources, including government statistics, and so agencies are not forced to rely on a single supplier of information. Relianace on multiple sources should provide a credible range of estimates. Also, alleged industry bias does not run in only one way. For example, information on the cost of pollution control should be obtained not only from the regulated industry but also from the manufacturers of pollution control equipment.

Question 6. Do you believe that a special mechanism is required to facilitate coordination between Federal regulatory agencies and States and local governments? Should agencies routinely send regulatory proposals to States and local governments for their comments?

Answer. It depends on what is meant by "special mechanism." In our report on regulatory coordination we suggested that OMB encourage the early involvement of State and local governments in the review of regulatory activities. We believe that there should be active consultation consistent with applicable legal requirements. At the very least, agencies should maintain mailing lists targeted at State and local government officials and groups relevant to each regulatory program, and they should send out copies of their Notice of Proposed Rulemaking or Advance Notice of Proposed Rulemaking if they issue one.

Question 7. To what do you attribute the great variation in costs to the agencies of doing a regulatory impact analysis? At EPA, costs per analysis ranged from $33,000 to $1.2 million. Is this because some regulations are much more complex than others, or do agencies use different criteria and procedures in different cases?

Answer. There is a substantial variation in the cost of agencies doing regulatory analysis because of the complexity of the regulations, the experience of the agency, and the criteria for doing the analysis. Thus, an EPA regulation in a new area which involves a substantial data gathering effort and major engineering studies will be much more expensive and time consuming than routine analyses done by the Department of Agriculture for marketing order regulations. Some agencies conduct analyses of less complex and comprehensive regulations than others and this also accounts for the cost differences.

Question 8. Do you have any information to indicate how long it will take an agency to complete a regulatory impact analysis? Is the analysis done concurrently with the development of the proposed rule, or is an additional period after the completion of the proposed rule required for the completion of the regulatory analysis?

Answer. It is impossible to say how long an analysis will take. It depends on all the factors cited in answering question no. 7. With regards to the timing of the analysis, at least a part of the regulatory analysis is generally done concurrently with other elements of developing the proposed rule. If the analysis is very complex, the rest of the rule development process will have to wait while analytic work is proceeding.

Question 9. In the course of your study, did you develop any criteria for determining which existing rules will be defined as "major" for the purposes of this bill and the Executive Order? Do you know of any way to determine how many "major" rules are on the books?

Answer. We did not independently develop any criteria for determining which existing rules will be defined as major, but rather relied on the criteria already in S. 1080 and the Executive Order. There is no set list of how many "major" rules are currently in existence, and we know of no simple way to determine this.

Question 10. How would you recommend the bill be amended to provide agencies with sufficient discretion to contract out for essential information without allowing them to rely exclusively on consultants to do regulatory impact analyses?

Answer. We suggest that the section of S. 1080 that restricts the use of consultants be eliminated. While we appreciate the objectives of the proposed section, we believe that they can be achieved through the application of current law and policy. In our estimation, rulemaking is inherently governmental in nature, being so intimately related to the public interest as to mandate performance by Federal employees. Accordingly, Office of Management and Budget Circular A-76 (March 29, 1979) requires in paragraph 5(f) that the discretionary application of government authority must be performed by Federal employees. At the same time, consulting services of a purely advisory nature may provide responsible agency officials with legitimate assistance in the performance of a particular governmental function. In this regard, Office of Management and Budget Circular A-120 (April 14, 1980) establishes policy and guidance to be followed in determining and controlling the appropriate use of consulting services which are provided by persons or organizations considered to have knowledge and special abilities that are not generally available in the agency.

While we have found problems with the use of consultants, they are soluble through administrative action. In our report, "Civil Servants and Contract Employees: Who Should Do What For The Federal Government (FPCD-81-43, June 19, 1981), we recommended that the Office of Management and Budget should prepare written guidelines that will better distinguish between contractors advice on government functions and their performance of such functions. OMB agreed with this recommendation and is proposing changes to Circular A-120 that will, among other things, require additional management controls to insure that government functions are not performed by contractors. It is our opinion that agency conformance with the justification and reporting requirements of the OMB circulars would obviate the need for restating such an existing requirement in proposed Section 553(3)(3) of Title 5, United States Code.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY SENATOR DURENBERGER

Question. Mr. Socolar, I am concerned about three issues regarding regulations and meaningful regulatory reform.

1. At the federal level, neither the Congress nor the Executive branch are looking at regulations from the perspective of the business or individual who must comply.

2. Neither the Congress nor the Executive branch are looking at regulations in a comprehensive way, but rather are taking a regulation-by-regulation approach.

3. As a result, when we pass individual laws, to be enforced by regulations drafted by Executive agencies, we impose tremendous costs of compliance on the private sector. We do not have accurate figures on those costs; we do not know which sectors of the economy are paying them; we do not know the cumulative impact of those costs on individual sectors of the economy.

In order to get a handle on the impact of regulatory costs, I would like to move in the direction of a regulatory budget. A first step in that direction would be a cost-accounting bill. Such a law would require OMB to establish Cost-accounting procedures to be followed by the agencies. OMB would compile the costs in a Special Appendix to the budget, to be submitted to the Congress along with the President's budget. GAO would review the Special Analysis and prepare comments for the Congress. Congress would not be required to take any action on the information, but could use the information to judge the ability of various sectors of the economy to pay additional compliance costs before new regulations are imposed.

I am interested in GAO's comments on a cost-accounting bill of this nature, and on the role GAO could and should play in this process.

Answer. This office is in agreement with the need to establish accountability and control over Federal programs that are currently regarded as "uncontrollable" whether these costs are now recorded on the Federal budget or are off the budget. Federal regulatory programs, like other Federal programs, have brought significant benefits to the public. Unlike most other programs, however, the costs of implementation are borne primarily by the non-Federal sector—the regulated entities that must comply with regulations. While we agree with the need for some methods to control regulatory costs and understand the theoretical appeal of a regulatory budget, we do not believe that enactment and implementation of such a budget or even of the cost-accounting bill described in the question is feasible at this time.

It is generally agreed that the most troublesome aspect of the regulatory budget concept is the problem of defining and measuring the costs of regulation. While for purposes of a regulatory budget, estimates to the nearest million may be adequate, it is doubtful that even those estimates would reflect reality, and estimates may differ by a substantial amount. For example, leading economic studies of the cost of railroad regulation have ranged from $35 million to $2.9 billion.

Second, it is not clear what should be reckoned as a cost. In some regulatory regimes such as transportation, the cost to the society of lessened competition may have been greater than any direct compliance cost, yet there is little agreement on whether or how to measure these second-order effects.

The cost-accounting proposal measures only costs and not the benefits that the regulations are to bring about. This situation is not necessarily a flaw since the agencies would presumably be conscious of the benefits, and if a lid were eventually placed on costs agencies would retain only the most cost-effective regulations. However, without a parallel indicator of benefits at some level setting socially useful cost ceilings would be problematical, and it would be impossible to establish rational priorities.

During the previous Administration, the Office of Management and Budget circulated a draft cost-accounting bill. In response to the OMB draft proposal, many regulatory agencies pointed out that the regulatory budget, on top of requirements for regulatory analysis, would mean an enormous increase in agency paperwork. It may be that this is an acceptable price to pay for establishing control over regulatory cost, but the burden should be recognized. Less obvious is the potential burden on the regulated parties themselves. Data on cost will most likely have to come from the regulatees. The necessity for more systematic data collection in order to more accurately measure costs could impose a new and heavy paperwork burden on regulated entities—and a new layer of bureaucracy to attempt to verify those cost estimates.

Before considering a regulatory budget, we believe the requirement for regulatory analysis and review as manifested in Executive order 12291 and potentially in S. 1080 should be given more time to be implemented and then evaluated. We believe that in general a requirement for regulatory analysis and the evaluation of existing regulations is preferable at this time to a regulatory budget or cost-accounting bill. The current approach hold promise of assuring that the need for health, safety, and other regulation is achieved at the lowest cost, and the current efforts may mitigate the need for a regulatory budget.

Admittedly, the current approach does not address the problem of the aggregate cost of all Federal regulation for society as a whole—a problem which is the primary impetus for a regulatory budget. Nonetheless, a regulatory budget would have to start from some sort of base. That base, just as with an expenditure budget, would have to derive in some fashion from current compliance costs. Such a base could only be derived from a comprehensive review of the effect of current regulation. Just satisfying this prerequisite condition for implementing a regulatory budget goes a long way to satisfying the need for controlling the aggregate cost of regulation because compiling this information in itself would provide Congress, OMB, and the agencies with much of the necessary information with which to assess regulatory priorities. Again, such a review process for major regulations is already in process under Executive Order 12291, and we believe it to be the more prudent course to see how that review process works before imposing a new complex overlay on the budgetary process.

Senator **Rudman**. Our next witness, Lester Lave, an economist of the Brookings Institution here in Washington.

Welcome, Mr. Lave.

We are running short on time, unfortunately. I would appreciate it if you would summarize your statement and we would, of course, incorporate your entire statement in the record.

TESTIMONY OF LESTER B. LAVE, ECONOMIST, BROOKINGS INSTITUTION, WASHINGTON, D.C.

Mr. **Lave**. We all desire regulation to be more efficient and effective. After all, what is our immense national wealth and income worth without health and safety, a clean environment and other protections?

Unfortunately, the Nation's past attempts to achieve these goals through regulation have made disappointing progress, raised costs and slowed productivity increases and run afoul of other deeply held goals. Everybody agrees that we need regulatory reform but nobody agrees what it is we ought to be doing.

There are some areas where it is clear that deregulation is the answer. My colleagues at the Brookings Institution have been advocating for almost 20 years that we deregulate the transportation area. However, there are other areas, particularly those regarding health, safety and the environment, where deregulation simply will not do the job.

In these cases, there is no option but to take on this more complicated task of improving regulations rather than trying to deregulate. I was asked to comment on two bills, S. 344 and S. 1080, and I would like to begin by commenting briefly on S. 344.

There are three principal reasons why regulatory agencies make bad rules. The first is that they are attempting to implement ill-conceived legislation. The second is that they have been doing their job badly in the sense they have not set priorities, gathered facts, et cetera. The third is that Congress has failed to exercise oversight to keep agencies on track.

S. 344, by attempting to deal with the regulations that result, is trying to deal with the symptom rather than the disease. To remind us all of elementary civics, the idea of creating regulatory agencies was that Congress neither has the time nor expertise to set individual rules. Rather, Congress is supposed to set the policies and then these agencies carry out the rules.

When Congress has attempted to set the rules directly, as in the automobile emission standards of the Clean Air Act, the results have been unfortunate. They have been time-consuming and have not turned out to be very good in practice.

There simply is no way in which the Congress can review thousands of new rules each year to determine if they are in the public interest. In past instances of legislative veto, such as the automobile interlock device, saccharin, and some of the recent FTC actions, I would regard the legislative veto as evidence of Congress failure: Congress failure to set out clear legislation and Congress failure to exercise oversight.

I would hope that these are the rare exceptions rather than the rule in the future.

Let me now turn to S. 1080 and begin briefly by characterizing Executive Order 12291. Basically I support the use of the benefit-cost analysis.

Executive Order 12291 has a number of problems with it, principally in over-reliance on benefit-cost analysis. The tool is not capable of bearing the burden that Executive Order 12291 puts on it. In particular, there is no unique set of assumptions that everybody agrees are best. Consequently, there will not be a unique solution which will turn out to be the least costly for society or have the greatest net benefits. To pretend benefit-cost analysis can produce such a result is simply a misreading of what the tool can do.

S. 1080 does a better job of trying to characterize what can be done by the analysis. It requires there be benefit-cost analysis and in general recognizes what the tool can do.

There is no question that regulatory analysis can be used for deregulation and furthermore no question that it should be used. After singing the praises of regulatory review, it is hard to see why some area ought to be exempted.

It doesn't make any sense to exempt some area just because somebody thinks it is inconvenient at this time to do it. That doesn't mean I am critical of deregulation. It is essential and terribly frustrating to take so long to get deregulation in the transportation area. However, exempting deregulation would politicize regulatory analysis.

Regulatory analysis is time-consuming. Yet it seems to me that if regulations are better thought out and if there are more public hearings to set out the issues, then the result in the end will be more, not less, protection. Our problem at the moment has been issuing many ineffective regulations. By improving the quality of regulations there is a hope that we could cut down on the amount of litigation in the future. I am not holding that out as much of a hope, but at least there is a possibility.

Finally, I would like to quote from the *Cotton Dust* decision, which was handed down last Wednesday, and Justice Rehnquist, in a dissent, said the following:

> Last year, Justice Powell reflected that "one might wish that Congress had spoken with greater clarity" in the OSHA Act. I am convinced the reason that Congress did not speak with greater "clarity" was because it could not. The words "to the extent feasable" were used to mask a fundamental policy disagreement in Congress. I have no doubt that if Congress had been required to choose whether to mandate, permit, or prohibit the Secretary from engaging in a cost-benefit analysis, there would have been no bill for the President to sign.

Justice Rehnquist has given an insightful statement as to the fundamental problem with current regulation: Congress has not decided what it wants. Without clear legislation, without oversight hearings to insure the agencies comply with congressional directives, no regulatory reform can be of much help. I view S. 1080 as being an important, very small step for regulatory reform.

Thank you, for your attention.

Senator RUDMAN. Senator Eagleton?

Senator EAGLETON. Thank you, Mr. Chairman.

At a previous hearing of this committee, Mr. Lave, Senator Levin discussed with Alan Greenspan, the former Chairman of the Council of Economic Advisers, the question of whether deregulatory proposals could, in fact, be inflationary. This question was obviously related in a direct way to another question: is there an economic justification for determining whether the benefits of deregulation to a regulated industry justify the costs in terms of inflationary impact on the broader economy? So with that premise, I have some questions.

Is it true that as a general matter deregulation can be inflationary in the sense that it imposes costs on other sectors of the economy that could be greater than the reduced costs to a regulated industry?

Mr. LAVE. It certainly is true that there can be instances where deregulation can be in inflationary. In particular, if a regulation were quite a good one, and we were mistaken in getting rid of that regulation, then certainly your hypothesis could occur.

Senator EAGLETON. What in your view are some of the ways in which conducting regulatory analyses for such proposals to deregulate could be useful?

Mr. LAVE. I think that deregulation of economic aspects of air travel, is a good case in point. Again, I am one of those people who has been arguing for years that we should deregulate the airlines, trucking and so on. It would have been a terrible shock if, without any warning, the CAB had suddenly said to the airlines, "You are no longer regulated, save for the antitrust laws and other statutes for businesses generally." The result would have been a terrible inconvenience to travelers as airlines ceased actions which were now illegal and tried to figure out how to operate under the new rules.

In contrast, managing that deregulation over a period of 2 or 3 years was helpful.

The airlines had never faced competition either domestically or abroad. There was some learning that had to go on, some need to coordinate practices; certainly there was a need for thinking this out, for implementing this gradually. The same is true with trucking. There, again, implementing deregulation over a period of several years is good.

Senator EAGLETON. I would like to take you through one specific example. This is a very recent one. I think we could use it as a case study in our deliberations on this bill. A recent GAO report recommended that about 60 some odd airport towers throughout the United States be closed and for the discontinuance of these 60 some odd towers would in the GAO's opinion save a lot of money. And they assign specific dollar savings to each of the towers down almost down to the penny.

Closing the Miami County Dade Collier Tower, says the GAO, would save $1,167,660. By the way, this is not the main Miami airport. They go through a whole series, as I say, down almost to the precise penny.

In deciding whether to establish control towers at these medium-size and small airports and deciding whether to discontinue or curtail control tower service where it exists, the FAA calculates, "a cost-benefit ratio." As described in this recent GAO study, the FAA calculation compares "the dollar value of control tower benefits, against analyzed operation maintenance and cost." The calculation "of the benefits of preventive actions" involves analysis of such factors as the number of passengers that would be injured or killed in air collisions attributable to the lack of control tower protection and the value of aircraft that would be lost or damaged.

I am still receiving some information about the methodology used by the FAA. As a result, my staff was only able to provide you with fragmentary information on a rather last-minute basis. However, recognizing you might want to supplement your response when more information is in, I think it would be useful to ask you several questions about the methods used by the FAA in this particular case.

Area No. 1: value placed on accidents and death. FAA has informed me that it assigns a dollar value of $300,000 to a life lost in an airplane collision and a value of $61,800 for a serious injury. These are apparently the maximum damages that injured persons or the estate of deceased passengers could recover under present law.

In your view, is it sound cost-benefit practice to derive a dollar figure for life and injury based on standards used for the seemingly unrelated purpose of monetary compensation? Is there any reason to assume the amount the Government negotiators of compensation rates are willing to make airlines pay for death and injury bear any resemblance to the value the Congress and the public assign to the important FAA function of protecting the traveling public from the danger of air collision?

Mr. LAVE. With your permission, can I expand a bit on my answer and then give you a precise response?

Senator EAGLETON. Yes.

Mr. LAVE. The FAA has a long history of doing extensive, precise cost-benefit analyses. These have not been controversial in the main. The FAA uses these as the basis of its decisions when it comes to ask Congress for funds to put up control towers or whatever. These analyses are used to convince Congress to put up the money and Congress is almost invariably convinced. Clearly, regulatory analyses are possible and have been found in the large majority of past FAA cases to be helpful.

Now, to get to your specific question, the answer is no. Negotiated compensation need not have much, if anything, to do with the amount that individuals or society place as value on their lives. The vast majority of benefit-cost analyses in the past were done on the basis of a very flawed notion, valuing a premature death of the present discounted value of lost wages plus medical costs.

In those terms the average American right now is probably worth about $60,000.

Senator **Eagleton**. Sixty, or sixteen?

Mr. **Lave**. Sixty.

A figure like that absolutely makes no sense and yet that is what has been used for many benefit-cost analyses in the past. There have been more modern attempts to characterize what people would be willing to pay, for example, to lower the probability of premature death by 1 in 1,000 per year or how much they would have to be paid in order to accept an increase in the probability of premature death by 1 in 1,000 per year. For example, there are a number of occupations that are risky—coal miners and deep sea divers, for example—and there is a part of the wage for these occupations that represent a risk premium. Workers get between $240 and $1,500 for assuming an additional risk of premature death of 1 in 1,000. Thus, values that range between about $240,000 and about $1,500,000 per premature death represent the expected amount of money that people would have to be paid in order to assume additional risks.

None of those risks are large. They are risks on the order of 1 in 1,000 per year. This method produces estimates that are much better than the FAA's $300,000 figure.

By the way, up until recently, the FAA justified its $300,000 figure by saying it was based on court awards for wrongful death. This method would produce a figure higher than $300,000.

One of the problems with Executive Order 12291 in placing this burden on benefit-cost analysis is that it assumes precise estimates exist and are accepted by everyone regarding matters such as the social cost of premature death.

The benefit-cost analysis shows there are some towers that are not economical to keep up and there are some towers that are clearly worthwhile. There is a set of towers in the middle where the decision is unclear. Using a figure of $300,000, the FAA has given one cutoff decision. Another figure would lead to a different decison. If the the Congress decided that the real value of premature death was greater than $300,000, then the benefit-cost method would be useful, but the precise decision would be different.

Benefit-cost analysis ought first to be used to indicate those two ends where action is clear as well as that range in the middle where action is murky. Finding a precise decision depends as much on who is being hurt and how value conflicts ought to be resolved as on the formal analysis within this middle range.

All of us would like to have lower taxes, all of us would like to have safer air transportation. Congress must interpret those desires in the context of a particular tower. I am glad I am sitting on this side of the table and don't have to make those decisions. Somebody has to. One of the problems is that Congress has not been willing to do that often enough. Benefit-cost analysis can clarify the issues and location of the murky area where we need guidance and expert judgment. Then we need public hearings and congressional leadership.

Senator **Eagleton**. I agree wholeheartedly with your answer. I think some people believe there is something magical, some degree of absolute certainty, to cost-benefit analysis. Some believe that we can get definitive, precise answers, that we can use computers and that all wisdom spews forth from the computers answer.

There are these murky areas, to use your term, and cost-benefit analysis properly used can give you some guidelines. Maybe it can identify the two extremes you pointed out. Some air towers are self-evidently necessary, such as LaGuardia, N.Y. Perhaps some towers are self-evidently not necessary. Take, as a possible example, Pucky Huddle, Mo. There will be some murky areas in between where you are not going to get precise definitive answers that you can rely upon. Is that a fair summary?

Mr. LAVE. That is exactly what I meant to say. You said it better than I did.

Senator EAGLETON. One other question for illustrative purposes. The FAA cost-benefit ratio does not account for the fact that lessening airport tower service may result in serious curtailments of flight into cities affected. This in turn, could have serious effects on the city's economic life. Question: Wouldn't a good faith analysis of the adverse effect of curtailing control tower service have to take into account such potentially disruptive economic effects?

Mr. LAVE. Of course.

Again, the thing I like most about S. 1080 is that it requires the agency to look at alternatives, both to the proposed regulation and more generally. Often the agency is trying to look rather narrowly at its mission, which results in a nearsighted interpretation of what the Congress intended.

That is unsatisfactory. The agency must try to account for the social effects of a particular regulation.

Senator EAGLETON. My final question, again using this as a case study, the FAA uses a standard of discounting the value of the human life 10 percent per year. Thus, using this formula, a life lost in 1981—immediately, today—is valued at the $300,000 figure, while a life that is projected to be lost in 1991—10 years from now—is valued at $118,000.

Now, putting aside the obvious moral questions, is there any justification in terms of cost-benefit methodology for discounting the value of human life as though it were a depreciating machine whose future loss is less troubling economically than its present loss?

Mr. LAVE. There is some justification for doing discounting, but the method the FAA has used is not theoretically correct. It is frequently used, but it isn't correct.

Should a premature death 10,000 years from now be of as much concern as a premature death today? The answer is surely no. Would a case of cancer 100 years from now be of as much concern as it is now? The answer is no for two reasons. First, we will have better ways of dealing with cancer at that point. Second, without being cynical about this, people 100 years from now will make their own decisions. That doesn't mean we should leave them with a bankrupt future, but they make their own decisions.

Indeed, if I asked the question of myself, would I rather contract cancer 20 years from now or tomorrow—I certainly have a clear answer. Twenty years from now is better than the present, thank you. There are good reasons for saying that death, whether by accident or disease, which occurs 20 years from now, is less onerous than a death which occurs immediately.

Discounting these back to the present using some interest rate, such as 10 percent, is theoretically wrong. For an investment project, for example, IBM, putting $1 billion into a new plant, then certainly revenues in the future ought to be discounted back at 10 percent or whatever.

Lives are a different story. What we would have to do on lives is try and find out, for example, how much people value saving a premature death now and how much they would value saving a premature death in 20 years. Implicit in their answer is a discount rate. We ought to be finding out from people how they make these decisions.

Benefit-cost analysis is a method, but it relies on a whole series of judgments from people. To assert that we know what those judgments are without asking or getting some evidence for them is crazy.

If we are going to give an increased role to benefit-cost analysis, either through Executive Order 12291 or S. 1080, we better get more information from people about how they want these matters to be treated.

Senator EAGLETON. I couldn't agree more. In a way it is a facet of garbage in, garbage out.

Mr. LAVE. Yes.

Senator EAGLETON. I may have some additional questions for Mr. Lave, Mr. Chairman, that I will submit to him in writing.

Senator RUDMAN. Thank you very much, Mr. Lave.

[Mr. Lave's prepared statement follows:]

PREPARED STATEMENT OF LESTER B. LAVE

We all desire regulation to be more efficient and effective. What is our immense national wealth and income worth without health and safety, a clean environment, and other protections? Unfortunately, the nation's past attempts to achieve these goals through regulation have made disappointing progress, raised costs and slowed productivity increases, and run afoul of other deeply held goals such as freedom of choice.

Everyone agrees that we need regulatory reform, but there is little agreement about what should be changed. Some social goals can be achieved better without regulation; economists have long urged dismantling the economic regulation of airlines and trucks, as well as more general deregulation. Other social goals cannot be achieved without regulation. Market competition will prevent firms from being "socially responsible" insofar as curtailing polluting emissions, etc. raise costs. Deregulation is a simple solution for economic regulation, but improved regulation is the more complicated and difficult solution for health and environmental goals.

Two major approaches to regulatory reform are being considered by the committee: legislative veto in S. 344 and benefit-cost analysis in S. 1080. Legislative veto is treating the symptom, not the disease. Regulatory agencies make bad rules because: (1) they are attempting to implement ill-conceived legislation and (2) they have not set priorities, gathered the facts, performed the correct analyses, and (3) Congress has failed to use oversight to keep agencies on their track and to inform itself of the need for changes in legislation. S. 344 attempts to deal with the unsatisfactory result without dealing with the causes.

Congress created regulatory agencies to carry out the day to day operation of policies it designed; Congress does not have the time or expertise to formulate individual regulations. Where it has tried, as with the automobile emissions standards of the Clean Air Act, the results have been unfortunate, as well as extraordinarily time consuming. It makes no sense to burden Congress with reviewing the thousands of regulations published each year to ascertain which are in the public interest. I regard legislative veto, such as occurred for the automobile interlock device, saccharin, and recent FTC actions, to be examples of Congress' failure to write legislation clearly and exercise oversight. Improving these two areas would do much toward enhancing the effectiveness of regulation in contrast to legislative veto, which I believe would be pernicious.

Executive Order 12291 requires agencies to think before they act and to give economic efficiency first priority, before goals of equity and serving special interests. I agree with these goals but believe the executive order is deficient in placing a greater burden on the tool of benefit-cost analysis than it can bear. The tool is enormously helpful in discovering the implications of alternative regulations. While it can show many alternatives to be hopelessly inefficient, it cannot identify with confidence a unique alternative as being superior. Inevitably, minor, plausible variations in assumptions indicate the superiority of a slightly different alternative. Choosing within the set of "best" alternatives should depend on judgment and equity, not the idiosyncratic assumptions of the analysis. Economists should have the role of ruling out inefficient alternatives, but not of choosing among the set of efficient alternatives.

I support S. 1080 because I believe it holds the promise of making regulation more efficient and effective without the faults of the executive order. It requires agencies to gather the facts and perform analyses; agencies must estimate the benefits and costs of alternative regulations and present their estimates for public comment. I am opposed to asking the analysts to make particular assumptions which cannot be defended as more reasonable than other assumptions, and declare that the resulting best alternative is mandated. Few economists would care for such an economic despot.

In what is obviously a mental slip, Alan Greenspan testified that regulatory analysis would not be done for deregulation. If not, it could hardly be applied to more than a few of the myriad regulations to which President Reagan intends his executive order and Senator Laxalt intends his bill to apply. In my new book, The Strategy of Social Regulation, I show that benefit-cost analysis can be done for a wide range of regulations; deregulation would be one of the simpler applications.

For almost 20 years my colleagues at Brookings have been advocating deregulation of transportation. With them I share the frustration at how long it has taken to make progress. It would seem simple to support HR. 746 and exempt deregulation from this regulatory analysis and thus speed the time when agencies could act. However, that would be a bad decision for two reasons. The first is that the primary contribution of benefit-cost analysis is to clarify the implications of alternative actions so that bad ones can be rejected and difficulties can be anticipated. Deregulation is not so simple as repealing a law or regulation; as the CAB experience has shown, much analysis and work are required to smooth the transition. The second reason is the one-sided way of indicating that regulatory analysis, with all of its difficulties and delays, is required for new regulations but unnecessary for deregulation. If the requirement makes sense and is not simply a device to impede regulation, it should be applied even handedly. Is the intent improvement or revenge? Finally, by requiring periodic review of regulations, S. 1080 will lead to deregulation in those cases where the regulation cannot pass a benefit-cost test.

The proposal to exempt deregulation makes the point that regulatory analysis is both time and resource consuming. The requirement should not be imposed lightly. I firmly believe that requiring the analysis for major regulatory decisions is in the national interest. It would be disastrous to impose the analysis on minor decisions. Even the minor decisions should not be made without some thought about alternatives and their consequences; this analysis should be more elaborate and formal as the importance of the issues increases. Any rule set out for comment should have some sort of regulatory analysis, but it should be understood clearly that the analysis will be less formal and less elaborate for "minor" rules.

Requiring a regulatory analysis will inevitably decrease the number of regulations, given the time and resource requirements. However, I expect that the regulations which are issued will be better formulated, more easily implemented, and set aside less often by the courts; the result should be more, not less protection. However, there is no escaping the fact that regulations will not be able to protect all aspects of health, environment, and other regulated areas. Alternatives to regulation are required.

Justice Rehnquist, joined by Chief Justice Burger, dissented in the Cotton Dust decision, holding that the OSHAct was an unconstitutionally vague delegation of authority:

> Last year, Justice Powell reflected that ´one might wish that Congress had spoken with greater clarity ´in the OSHAct.´ I am convinced that the reason that Congress did not speak with greater ´clarity´ was because it could not. The words ´to the extent feasible´ were used to mask a fundamental policy disagreement in Congress. I have no doubt that if Congress had been required to choose whether to mandate, permit, or prohibit the Secretary from

engaging in a cost-benefit analysis, there would have been no bill for the President to sign.[1]

Justice Rehnquist has given an insightful statement as to the fundamental problem with current regulation: Congress has not decided what it wants. Without clear legislation and oversight hearings to ensure that agencies comply with Congressional directives, no regulatory reform can be of much help.

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1. American Textile Manufacturers Institute, Inc., et al., v. Donovan, Secretary of Labor, et al., June 17, 1981.

Senator **Rudman**. The final witness before the committee this morning, Doug Parker, Representation of the Institute for Public Interest, Washington.

Mr. Parker, we will enter your entire statement in the record this morning.

We would appreciate it if your summary could be just that, a summary, since we are all just about running out of time.

TESTIMONY OF DOUGLAS L. PARKER, INSTITUTE FOR PUBLIC INTEREST REPRESENTATION, ACCOMPANIED BY JUDY D. LYNCH, STAFF ATTORNEY

Mr. **Parker**. Thank you, Senator. We will do that.

With me today is Judy Lynch, who is one of our staff attorneys at the Institute for Public Representation who has worked on issues of regulatory reform for some time.

We appreciate the opportunity to testify because we would like to address the issue of Executive Order 12291, which may not have been fully considered in previous hearings and which is highly relevant to S. 1080.

Our particular perspective on this process is that we are attorneys who represent groups who are essentially outside the process. The people we represent are those whose interests are generally unrepresented and whose access to the administrative decisionmaking process has been restricted.

In general, our concern has been with openness and the need to make certain agencies act in a responsive way and give all citizens an opportunity for a fair hearing. We are, therefore, concerned about the recent turn that the whole regulatory reform movement has taken.

Particularly, we are concerned about Executive order 12291. I would ask that the committee include a copy of that Executive order in the record of these hearings, if that has not already been done.[1]

Our concern is that rather than furthering the basic goals of regulatory reform, of making the regulatory process more open, fair and responsive, Executive Order 12291 makes that process more secret, obscures the Government's responsibility for the decisions that it makes, creates a risk that it will enhance the role of special interest groups with special political access, and generally will dilute the right of public participation in the process of Government.

We certainly don't claim the current administrative process is flawless, either in terms of results or in terms of its procedure, but it does provide some assurance that all interested parties will be able to participate and that the agency action will be set forth in the complete record.

In our written statement, which I will not read, there is reference to some of the earlier efforts on regulatory reform that were adopted in earlier Executive orders by Presidents Ford and Carter.

Those Executive orders do not, in our view, endanger the sanctity of the administrative process anywhere near as much as Executive Order 12291 does.

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[1] See p. 450.

Last week, before Congressman Dingell's subcommittee in the House, there was testimony on the effect of the Executive order. There was a statement by George Eads, who was head of the RARG under President Carter. If you look back at that testimony, where Mr. Eads outlines what the difference is between the process under President Carter and the process under the current Executive order, it is very illuminating about the very significant differences between those procedures.

We think the current Executive order has transformed in a radical way the relationship between administrative agencies and the Executive, and that it has weakened the essential sort of procedural protections that we have all operated under for 30 or 40 years.

Judy Lynch has studied the impact of the Executive order during the last several months. She has looked at the impact that the Executive order has had on the regulatory process and I would like her to address some of our concerns in more detail.

Ms. LYNCH. Good Afternoon.

I appreciate the opportunity to testify today.

I would like to start out by saying that I think this Executive order issued by President Reagan represents a major restructuring of our regulatory process.

As you know, the general thrust of the order is to require that all the agency rules be based upon cost-benefit, or cost-effective analysis. To insure that this occurs, OMB has been granted operational oversight authority. A brief review of some specific details in the Executive order is essential in order for you to realize the revolutionary nature of the Executive order.

To begin with, the Executive order only requires analysis of major rules. The order provides some definition of that, but OMB is given the authority to order the agencies to treat any rule as a major rule for purposes of review. OMB may designate currently effective rules for review and the order provides no limits on the number of rules within one agency that OMB can designate for review.

An agency that proposes this review must prepare a cost-benefit analysis based upon methodology determined by OMB. If OMB is not satisfied with the analysis that the agency conducts, they may require the agency to obtain additional relevant data from any appropriate source. Again, OMB is free to determine what is relevant and what source is appropriate.

Once the agency completes its analysis of either the proposed, the final or already effective rule, it transmits that analysis to OMB. Upon OMB's request, the agency consults with the Director of OMB, and they engage in a review of the agency's analysis. During that time, the agency must refrain from publishing its preliminary analysis until the review is concluded. I think it is these latter provisions in the Executive order which highlight the fact that OMB has almost completely unlimited authority to delay rulemaking.

There are no time limits within which OMB must complete its review of the preliminary, final or already effective rules. If OMB disagrees with the agency's analysis, this review could continue indefinitely. OMB can easily force agencies to conform with its own substantive views. In addition, under the order OMB has been granted authority to waive all the requirements for analysis with respect to any agency, rule or set of rules.

Again, the order provides no standards to guide OMB's exercise of this waiver of authority. I would like to engage in a more careful analysis of the effect of these provisions in the Executive order. I believe these provisions raise some very serious legal, practical and policy questions about the future of the regulatory process.

Senator RUDMAN. Let me interrupt for a moment. I appreciate the information. I am very familiar with the Executive order, but I am particularly interested in drawing your experience with that Executive order and what effect it has had as to what you might recommend to this committee for amendments to S. 1080.

That is really what I am interested in. You may procede as you wish. That is what I am interested in.

Ms. LYNCH. I will then briefly summarize, most of my testimony will deal with that issue.

The legal problems stem from the fact that OMB looks now like a lawmaker. It has virtually unlimited power over the agency rulemakings and it will be determining the substance of those rules.

Senator RUDMAN. I might point out we just had a bell sound for rollcall, so I expect we are going to have to finish your testimony up in the next 7 or 8 minutes, I would say.

Ms. LYNCH. Fine. Some of the procedural problems raised by the Executive order are the fact that the administrative record will not be complete. OMB is not going to be logging all its ex parte contacts. It is not going to keep a complete file of data and documents it receives.

Unlike the agencies, it doesn't have to establish a basis and purpose for the decisions it is making. It doesn't have to respond to comments from interested citizens and it can withhold action indefinitely. Since the Executive order is apparently intended to make OMB one of the most powerful agencies in our Government, I believe this situation is intolerable.

OMB has responded to some of these procedural problems. First it says since it is only supervising the process, it is not necessarily restricted by the traditional procedural requirements, but at the same time OMB prides itself on what it views to be its new roles as the final arbiter in the formulation of regulatory policy.

In addition, David Stockman released a memorandum on June 11 in which he issued some guidelines on OMB involvement in pending regulatory proceedings.

According to these guidelines, "The primary reform for receiving factual communications regarding proposed rules is the agency issuing the proposal, not the task force or OMB." Stockman said OMB officials will "'advise' those members of the public with whom they communicate that relevant factual materials submitted to OMB 'should' also be sent to the agency." If OMB develops its own factual information, then it should identify the material as "appropriate" for inclusion in the rulemaking file.

Even a cursory review of these guidelines demonstrate that they constitute no more than empty gesture giving token consideration to the crucial procedural problems raised by the Executive order.

They don't insure that the record contain all the material relied upon by OMB. They don't require any sort of logging of contents with outside parties. By referring to material that is sent to OMB the guidelines seem only to encompass written communications, thereby leaving open the possibility of extensive oral ex parte contacts influencing the merits of rulemaking proceedings.

The guidelines are only for factual information. They don't impose restrictions on legal or policy arguments submitted by private parties to OMB. The guidelines do not pertain to post-comment period contacts between OMB and private parties although these contacts pose an extremely acute threat to the integrity of the rulemaking process.

Most importantly, these guidelines are written in a vague manner. They don't actually require OMB to forward information on which it relies to the agency. The point I am trying to make here is that OMB must straighten its guidelines otherwise its review of agency actions and the final regulatory decisions be skewed in favor of those select groups with whom OMB has chosen to consult.

We are principally concerned about the implications of this Executive order for Congress. It seems that the unprecedented substantive powers that are granted to OMB under this Executive order demand some type of congressional reaction. In doing so, you should think carefully about the procedural problems the Executive order raises. For example, in S. 1080, I think there are several provisions which seem to be going in a completely opposite direction from that of the Executive order.

S. 1080 insures congressional intent is established. In the Executive order, congressional intent is certainly not a major concern. Cost-benefit analysis under S. 1080 is not a pure ration. The agency must show that the benefits "justify" the costs, not that they outweigh the costs as in the executive order.

S. 1080 also contains several provisions to insure the rulemaking record is as complete as possible. It requires agencies to indicate all sources of outside information.

It prohibits agencies from relying on any information not already in the public record and delineates several items to be included in the record. Again, the Executive order seems to be going in the opposite direction. It creates a situation where the rulemaking record will be far from complete.

Finally, S. 1080 seems to encourage effective public involvement in the regulatory decisionmaking process. For example, it contains oral testimony provisions for major rule-makings. The Executive order only encourages involvement of well-funded special interest groups.

In sum, Congress should carefully examine the procedural problems raised by the Executive order and determine how these problems can be avoided in the context of regulatory reform legislation; that is, measures to preserve the discretionary authority of agency officials, to protect the openness of the regulatory process to insure that Executive oversight authority is not abused are particularly appropriate.

Finally, Congress should assess the impact upon congressional oversight authority of OMB's new role in overseeing regulatory policy. If OMB is left with such complete control over regulatory policy, Congress authority and responsibility to oversee agency implementation of legislative programs will be seriously undermined. Since Congress usually grants agencies considerable discretion to fashion regulatory programs, OMB will have wide latitude to intervene in the regulatory process and to control its outcome. It will also have wide latitude to ignore the system of procedural protections designed by Congress as an integral part of that process.

Congress careful and time-consuming consideration of regulatory reform legislation reflects its unwillingness to debilitate important and successful regulatory programs. That careful consideration also reflects Congress intention to preserve a rulemaking system which is fair and open.

We urge this committee to consider the Executive order fully and carefully and assess its impact both on the existing administrative process and on any regulatory reform measures which this committee may adopt.

Again, thank you, Mr. Chairman.

Senator RUDMAN. Thank you very much for your testimony this morning.

[The prepared statement of Mr. Parker and Ms. Lynch follows:]

PREPARED STATEMENT OF DOUGLAS L. PARKER AND JUDY D. LYNCH

Mr. Chairman and members of the committee, I am Douglas L. Parker of the Institute for Public Representation at the Georgetown University Law Center. With me today is Judy D. Lynch, one of our staff attorneys, who has worked intensively on issues of regulatory reform for some time. We appreciate the opportunity to testify before this committee on some of the issues which you will be addressing as you consider legislation such as S. 1080.

The Institute for Public Representation is a public interest law firm affiliated with Georgetown University Law Center. For over ten years the Institute has been actively concerned with the federal administrative process. The groups and individuals we represent are those whose interests might otherwise be unrepresented and whose access to the administrative decision-making process has been restricted. For example, we have represented handicapped persons, pension plan participants, and consumers in commenting on agency regulations or petitioning agencies to amend their rules. In general, our constant concern has been with the openness of the process of government, and the need to make administrative agencies more responsive to the needs of all citizens. We have therefore welcomed the idea of regulatory reform, and have testified and worked with Congressional staffs on a variety of regulatory reform issues over the last three years.

We are now concerned, however, that the move for regulatory reform has taken an ominous turn. While there are many major issues raised by S. 1080 and other legislation now before Congress, those issues may be overshadowed by the need to consider the fundamental question of executive control over the entire administrative process. For groups such as ours, and the people we represent in agency rulemakings, the President's recent Executive Order 12291 causes grave concern. Rather than furthering the basic goals of regulatory reform by making the regulatory process more open, fair, and responsive, it makes that process more secret, obscures responsibility for decisions, enhances the role of special interest groups with political access, and generally dilutes traditional rights of public participation in the process of government.

While the current administrative process is far from flawless, it does result in decision-making that is reasonably expeditious and predictable. Further, partly as a result of forty years of judicial oversight, it does provide some significant assurance that interested parties will be able to participate in the decision-making, and that the basis for agency action will be set forth in a complete record. In recent years, as the size of government has grown, and as administrative regulation has become increasingly pervasive, presidents have recognized the need to ensure that administrative agencies do not adopt unnecessarily burdensome regulations. They have also acted to reduce the extent to which regulations are inconsistent with each other or with the overall policy goals of a particular administration. For example, Executive Order 11821 (3A C.F.R Section 203 (1974)), issued by President Ford in 1974, required agencies to submit to OMB and the Council on Wage and Price Stability a report on the costs and benefits associated with any proposed new regulation. While agency officials were required to prepare this "Inflation Impact Statement," they were not required to adopt any particular regulatory approach. This Executive Order merely established a framework for agencies and the President to assess the inflationary consequences of regulatory action.

Four years later, President Carter issued Executive Order 12044 (43 Fed. Reg. 12,661 (1978)) as an exercise of his supervisory powers over the administrative process. This order refined the regulatory management process begun by President Ford's Inflation Impact Statement. Executive Order 12044 established procedures for internal agency policy oversight, provided for the publication of semiannual agendas of regulations and established a broader "regulatory analysis" requirement. These procedures helped to sensitize administrative officials to the broader implications of their regulatory decisions.

Neither of these executive orders actually displaced the administrative discretion of agency officials, as these officials were not required to adopt any particular regulatory alternative. Nor did these earlier executive orders discard the procedural protections which ensured that the process operated fairly and openly.

Unlike these past presidential regulatory programs, E. O. 12291 has significantly transformed the relationship between the executive and the agencies, and has weakened essential procedural protections. The order has turned OMB into a super-bureaucracy with broad powers to intervene in the regulatory process. A review of these powers delegated to OMB demonstrates that it can determine if and when an agency may issue a rule as well as the terms of any rule which it allows an agency to issue. The ultimate effect of this executive order is, therefore, to preclude the agencies from exercising their statutory authority to design and implement the regulatory programs envisioned by Congress.

The general thrust of the executive order is to ensure that agencies only issue rules that are in accord with the principles of cost/benefit or cost-effectiveness analysis. Agencies may promulgate new rules, revise old rules, or develop legislative proposals concerning regulation only when societal benefits outweigh the costs of any of these endeavors. The order vests OMB with operational oversight authority by providing it substantial powers to ensure that agencies comply with this objective.

The executive order requires agencies to prepare economic analyses of "major" rules. Although the order provides a broad definition of "major" rules (Section 1(b)), OMB is given the authority to order agencies to treat any rule as a "major rule" for purposes of review. Section 6(a)(1). In addition to new rules, OMB may designate currently effective rules for review. Section 3(i). The order provides no limits on the number of rules within one agency that OMB can designate for review. An agency proposing a rule must prepare a preliminary cost-benefit analysis, or "regulatory impact analysis" (RIA), based upon a methodology designed by OMB.

Section 6(a)(2). If OMB is unsatisfied with the information upon which an agency has relied in developing an RIA, OMB may require the agency to obtain and evaluate any additional relevant data from any "appropriate source". OMB is free to determine what data is "relevant" and which sources are "appropriate". Section 6(a)(3). Once an agency completes its RIA of a proposed, final, or already effective rule, it must transmit that analysis to OMB for "review". Upon OMB's request, the agency must "consult with the Director [of OMB] concerning the review of (any) RIA" and "refrain from publishing its preliminary RIA until such review is concluded." Section 3(f). Agencies must also refrain from publishing final RIA's, upon OMB's request, until the agency has responded to OMB's views and incorporated those views and the agency's response in the rulemaking file.

These latter provisions highlight OMB's practically unlimited authority to delay rulemaking proceedings. There are no time limits within which OMB must complete its review of the preliminary RIA. If OMB disagrees with an agency's analysis, the "review" could continue indefinitely. Similarly, OMB may indefinitely delay final rules. The executive order provides that OMB shall be deemed to have concluded review of the final RIA unless it advises the agency to the contrary within 30 days prior to publication of the final rule. But this period may be expanded indefinitely if OMB disagrees with the content of the agency's rule. Section 3(f)(2). And finally, along with OMB's authority mentioned above to designate "currently effective rules for review", it is authorized to establish its own schedule for these reviews. Section 3(i). By so controlling the agencies' schedules for decision-making, OMB can easily force agencies to conform with its own substantive views.

OMB has also been granted the authority to waive all the requirements of the order with respect to any agency, rule, or set of rules. The order provides no standards to guide OMB's exercise of this waiver authority.

When viewing all these provisions together, it becomes clear that E. O. 12291 raises serious legal, policy and practical questions about the future of the regulatory process. First, there is serious question about the legal basis of OMB's new powers to substantially displace agency discretion in rulemaking. Secondly, the executive order poses a severe threat to the system of procedural fairness so firmly entrenched in the rulemaking process by turning what should be an open and public process into one cloaked by secrecy. And finally, Congress' legislative and oversight authority may be undermined by OMB in its exercise of its new powers under the executive order.

To begin with, OMB's broad-scale assumption of substantive powers to influence policy decisions may be beyond the scope of constitutional executive powers. According to the Supreme Court, "in the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952). The Justice Department's Office of Legal Counsel released a memorandum, simultaneously with the President's issuance of Executive Order 12291, which concluded that the role established for OMB is constitutional since it is merely "supervisory in nature." Simms, "Proposed Executive Order entitled 'Federal Regulation'", February 13, 1981. In the same memorandum, the Justice Department stated that "presidential supervision of the regulatory process is more readily justified when it does not purport wholly to displace, but only to guide and limit discretion which Congress has allocated to a particular subordinate official." Id. at 4. Yet in several ways the order has granted OMB the authority to do much more than simply guide discretion in conducting cost/benefit analyses of proposed or effective rules. When viewing OMB's power to indefinitely delay rulemaking, its power to establish standards for analyzing agency rules, as well as its power to designate the information upon which rules are to be issued, the inescapable conclusion is that OMB has been given the power to substantially displace agency authority in rulemaking.

This conclusion is supported by the American Law Division of the Library of Congress which recently completed a three-month study of the constitutional issues raised by E. O. 12291. Rosenberg, "Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues That May Be Raised By Executive Order 12291", Report by the American Law Division of the Congressional Research Service, June 15, 1981. In a compelling legal memorandum, it demonstrates why the President lacks authority to grant to OMB such extensive substantive powers over the rulemaking process. In fact, the American Law Division concluded, on the basis of its extensive review of historical, legal and legislative authorities, that a court challenge to the legality of the executive order may well succeed on the ground that the President exceeded his authority in issuing the order. Id. at 130-131.

Even if there were no fundamental constitutional questions surrounding OMB's new role, we would be very concerned about the procedural problems raised by E. O. 12291. Instead of furthering the goals of regulatory reform by making administrative decisionmakers more accountable to Congress, the courts, and the American public, the executive order has created a regulatory structure in which policy decisions are made in secret, in which responsibility for decisions is obscured, in which the traditional rights of the public to participate in the process of government are diminished, and in which influence by well-funded special interest groups is encouraged.

These unfortunate effects upon the regulatory process are apparent in many ways. Basically, the executive order undermines the goal of establishing a complete record for purposes of informed public involvement in the rulemaking process. As explained above, the executive order shifts much of the critical decisionmaking process from the agencies themselves to OMB. Despite this radical shift of authority, OMB is subject to none of the procedural restrictions imposed on other agencies by the APA and the courts. For example, the executive order does not require OMB to log ex parte contacts, or to maintain a file of data or information on which it relies. OMB need not state the basis and purpose of its decisions. Nor does it have to receive or respond to comments or petitions from interested citizens, and it can apparently withhold its action indefinitely. Its "appeal" procedures, involving OMB and the Presidential Task Force on Regulatory Relief, will be conducted without public scrutiny. Its decisionmaking, in sum, will be carried out almost entirely underground, and no one will be able to hold it accountable for its actions. Since the executive order is apparently intended to make OMB the most powerful agency in the government, such a situation is clearly intolerable.

OMB will contend, of course, that it need not follow any such procedures, since it claims that responsibility for decision-making remains with the agencies, and that OMB's role is only to provide supervision and guidance. Such a claim is inconsistent both with the terms of the executive order and with the public statements of OMB staff members, who pride themselves on being the "toughest kid on the block." Interview with James T. Miller III, Regulation (March/April, 1981), p. 22.

OMB has recently attempted to assure the public that it is sensitive to these procedural problems by issuing "guidelines" on OMB involvement in pending regulatory proceedings. In a memorandum issued on June 11 by David Stockman to various executive departments and agencies, Stockman stated that "the primary forum for receiving factual communications regarding proposed rules is the agency issuing the proposal, not the Task Force or OMB". Stockman went on to say that OMB officials will "advise" those members of the public with whom they communicate that relevant factual materials submitted to them "should" also be sent to the agency for inclusion in the rulemaking record. When OMB itself formally transmits factual material to a rulemaking agency, the guidelines state that OMB will "identify" that material as "appropriate" for inclusion in the rulemaking file.

These guidelines constitute no more than an empty gesture giving token consideration to the crucial procedural problems raised by the executive order. The guidelines do not ensure that the record contains all the material relied upon by OMB or the regulatory agency in issuing a final rule. They do not require any sort of logging of contacts with outside parties by OMB. By referring to material that is "sent" to OMB the guidelines seem only to encompass written communications, thereby leaving open the possibility of extensive oral ex parte contacts influencing the merits of rulemaking proceedings. The guidelines refer only to factual information, and do not impose any restrictions on legal or policy arguments submitted by private parties to OMB in an attempt to influence policy-making off-the-record. The guidelines do not pertain to post-comment period contacts between OMB and private parties although such contacts pose a particularly acute threat to the integrity of the rulemaking process. Most importantly, the guidelines are written in a vague and hortatory manner, and do not actually require OMB to forward information on which it relies to the agency. Nor does it require the agency to include such information in its own records if it is forwarded. The language of the Stockman letter suggests OMB has no intention to enforce vigorously even these flabby rules.

The Stockman directive also attempts to justify the lack of procedural protection in the executive order by offering reassurance that OMB procedures will be consistent with the recent opinion by the D.C. Circuit Court of Appeals in Sierra Club v. Costle, No. 79-1565 (D.C. Cir. April 29, 1981). In that opinion, the court held that the occurrence of intra-Executive Branch meetings during the post-comment period of an EPA rulemaking proceeding need not be docketed in the public record of that proceeding. However, that case is of limited relevance here. Most significantly, in Sierra Club the court was not faced with a situation where agency decision-making was simply displaced by the executive, as it is under Executive Order 12291. Since OMB has actually become the decision-maker, Sierra Club would require that its decisions be based on "the requisite factual support in the rulemaking record." Mr. Stockman's June 11 letter seems to indicate OMB has no intention of maintaining such a record. Further, the court in Sierra Club specifically found that the case did not involve an administration official serving as a conduit for communications from private parties to the rulemaking agency. That is precisely the greatest risk under the new OMB procedure. Neither the executive order nor the June 11 letter provide any control over such communications.

Thus, it is clear that the guidelines established by OMB will be ineffective in protecting the goal of fundamental fairness in rulemaking proceedings. Unless OMB strengthens its guidelines, well-funded and influential special interest groups will be able to use OMB as an off-the-record conduit to influence agency decisions. Although the executive order has only been in effect for a few months, there is already evidence of special interest groups flocking to OMB to express their displeasure with particular federal agencies. This is not too surprising since the task force has affirmatively solicited input from selected interest groups. According to Murray Wiedenbaum, "the task force has embarked on an outreach program of bringing in individuals and groups from the private sector to provide information on regulatory problems." Interview with Murray Wiedenbaum, Regulation (March/April 1981), p. 19. While these outside groups may have valuable information for OMB to assist it in its new role, OMB should be willing to place this information in the public record. Otherwise, OMB's review of agency actions, and consequently the final regulatory decisions, may be skewed in favor of those select groups with whom OMB has chosen to consult.

The unprecedented substantive powers granted to OMB under the executive order demand some type of congressional reaction. Since the Congress is now actively seeking methods to implement regulatory reform, it is especially appropriate and timely for it to evaluate carefully the challenges posed by Executive Order 12291. The Congress should carefully assess whether the regulatory reform program initiated by the executive order is consistent with Congress' own regulatory reform goals. Additionally, the Congress should examine the procedural problems raised by the executive order and determine how these problems could be avoided in the context of regulatory reform legislation. That is, measures to preserve the discretionary authority of agency officials, to protect the openness of the regulatory process and to ensure that executive oversight authority is not abused would be particularly appropriate. And finally, the Congress should assess the impact upon congressional oversight authority of OMB's new role in overseeing regulatory policy. If OMB is left with such complete control over regulatory policy, Congress' authority and responsibility to oversee agency implementation of legislative programs will be seriously undermined. Since Congress usually grants agencies considerable discretion to fashion regulatory programs, OMB will have wide latitude to intervene in the regulatory process and to control its outcome. It will also have wide latitude to ignore the system of procedural protections designed by Congress as an integral part of that process.

The Congress' careful and time-consuming consideration of regulatory reform legislation reflects its unwillingness to debilitate important and successful regulatory programs. That careful consideration also reflects Congress' intention to preserve a rulemaking system which is fair and open. We urge this Committee to consider Executive Order 12291 fully and carefully, and to assess its impact both on the existing administrative process and on any regulatory reform measures which the Committee may adopt.

Thank you Mr. Chairman and members of the committee for the opportunity to present our views on Executive Order 12291.

Senator RUDMAN. We will now stand in recess to the call of the Chair.

[Whereupon, at 12:40 p.m. the committee was recessed to the call of the Chair.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

97TH CONGRESS
1ST SESSION

S. 344

To increase the accountability of, policy coordination by, and management of priorities by agencies through an improved mechanism for congressional oversight of the rules of agencies.

IN THE SENATE OF THE UNITED STATES

JANUARY 30 (legislative day, JANUARY 5), 1981

Mr. LEVIN (for himself, Mr. BOREN, Mr. BAUCUS, Mr. PRYOR, Mr. SIMPSON, Mr. COCHRAN, Mr. SASSER, Mr. DIXON, Mr. INOUYE, and Mr. HEFLIN) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

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A BILL

To increase the accountability of, policy coordination by, and management of priorities by agencies through an improved mechanism for congressional oversight of the rules of agencies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. This Act may be cited as the "Agency Accountability Act of 1981".

SEC. 2. (a) The Congress finds and declares that—

(1) agencies issue a large number of rules that have a significant impact on the Nation;

(2) these agencies are staffed by persons who are not elected and who are therefore not directly accountable to the public;

(3) some of the rules issued by these agencies may conflict with or duplicate other rules or may not conform with legislative intent;

(4) conflicing or duplicative rules may contribute to governmental inefficiency, and rules which do not conform with legislative intent may frustrate the purposes and implementation of congressionally mandated programs; and

(5) conflicting or duplicative rules and rules which do not conform with legislative intent may also impose unnecessary burdens on State and local governments.

(b) It is the purpose of this Act, therefore, to assure increased agency accountability to the public through their elected officials and adherence to legislative intent in the issuance of agency rules.

SEC. 3. (a) Each agency shall prepare an agenda listing all areas in which the agency intends to propose significant rules within the following twelve-month period. The agency shall transmit such agenda or relevant portion thereof to the appropriate committee in the Senate and the House of Representatives. Failure to list an area of possible rulemaking on an agenda shall not preclude an agency from proposing or issuing any rule. The agenda, or relevant portion thereof, shall be transmitted to the appropriate committees within one hundred and eighty days after the effective date of this Act and semiannually thereafter.

(b) On the day an agency forwards to the Federal Register for publication a proposed or final significant rule the agency shall transmit a copy of such rule to the appropriate committees. Such committees shall be authorized to receive any rule under this subsection whether the appropriate House is in session or recess.

SEC. 4. (a) Notwithstanding any other provision of law, no significant rule may become effective until the expiration of a period of twenty days after the date on which the rule is received by the appropriate committees. If before the expiration of such twenty-day period, either appropriate committee orders reported a joint resolution disapproving the rule, the rule addressed by the resolution may not become effective until the earlier of—

(1) the expiration of sixty days after the date on which the committee ordered reported such resolution: *Provided,* That during such time a joint resolution disapproving such rule has not been enacted into law; or

(2) any time after either House of Congress has rejected a joint resolution disapproving such rule; or

(3) the adjournment of Congress sine die at the end of a Congress: *Provided further,* That at least thirty days have expired since the date on which the rule was received by the appropriate committees: *And provided further,* That during such time a joint resolution disapproving such rule has not been enacted into law.

(b) Whenever a committee reports a joint resolution of disapproval pursuant to this section, the resolution shall be accompanied by a committee report specifying the reasons for the committee's action.

(c) For purposes of this section—

(1) "days" means only days of continuous session of Congress;

(2) continuity of session is broken only by an adjournment sine die at the end of a Congress; and

(3) the days on which either House is not in session because of an adjournment to a day certain shall be excluded in the computation of days of continuous session of Congress for the twenty-day and thirty-day periods referred to herein if the adjournment is for more than three days, and shall be excluded in such computation for the sixty-day period referred to herein if the adjournment is for more than fifteen days.

SEC. 5. The provisions of section 3 and section 4 of this Act may be waived with respect to a particular rule if—

(1) the head of the agency promulgating the rule determines that the rule is being issued in response to an emergency situation or other exceptional circumstances requiring immediate agency action in the public interest, or the contents of such rule must be kept confidential prior to the effective date of such rule; and

(2) the head of the agency submits to the chairman and ranking minority members of the appropriate committees a written notice of the determination under paragraph (1).

SEC. 6. Congressional inaction on, or rejection of, any resolution of disapproval concerning a rule shall not be deemed an expression of approval of the rule involved. The compliance of any agency with the requirements of this Act, including any determination by an agency under this Act, shall not be subject to judicial review of any kind.

SEC. 7. (a) The term "agency" has the same meaning as in section 551(1) of title 5, United States Code.

(b) The term "appropriate committee" means the single committee in the House of Representatives and the single committee in the Senate which has primary jurisdiction over the statute pursuant to which the agency may issue a particular rule.

(c) The term "rule" means a rule required to be published for notice and comment under section 553(b) and section 553(c) of title 5, United States Code, or other similar statutory requirement, except that the term rule shall not include any proceeding that determines rates of particular applicability to an individually named person or persons, nor any rule relating to the internal revenue laws of the United States.

(d) The term "significant rule" means any rule which an agency shall determine to be significant. In determining whether a rule is significant, the agency shall consider among other things: the type and number of individuals, businesses, organizations, and State and local governments affected; the compliance and reporting requirements likely to be involved; the direct and indirect effects of the regulations, including the effect on competition; and the relationship of the rule to those of other programs and agencies.

(e) The term "joint resolution" means only an unamendable resolution, the matter after the resolving clause of which reads: "That the Senate and the House of Representatives disapprove the rule entitled   , transmitted to the Congress by   on   , 19   .", the blank spaces to be filled in with the appropriate title of the rule, agency, and date.

SEC. 8. This Act shall not apply to rules proposed or issued pursuant to a statute which expressly provides for congressional review or veto of agency rules.

SEC. 9. This Act shall become effective at the beginning of the first session of the Ninety-seventh Congress.

II

97th CONGRESS
1st Session

S. 1080

To amend the Administrative Procedure Act to require Federal agencies to analyze the effects of rules to improve their effectiveness and to decrease their compliance costs; to provide for a periodic review of regulations, and for other purposes.

IN THE SENATE OF THE UNITED STATES

April 30 (legislative day, April 27), 1981

Mr. Laxalt (for himself, Mr. Leahy, Mr. Thurmond, Mr. Roth, Mr. Biden, Mr. Eagleton, Mr. Robert C. Byrd, Mr. Bentsen, Mr. Mathias, Mr. Hatch, Mr. Dole, Mr. Simpson, Mr. East, Mr. Grassley, Mr. Denton, Mr. Specter, Mr. Percy, Mr. Stevens, Mr. Durenberger, Mr. Mattingly, Mr. Kennedy, Mr. Metzenbaum, Mr. DeConcini, Mr. Baucus, Mr. Heflin, Mr. Chiles, Mr. Nunn, Mr. Sasser, Mr. Pryor, Mr. Levin, Mr. Schmitt, Mr. Helms, Mr. Tower, Mr. Hatfield, Mr. Domenici, Mr. Weicker, Mr. Garn, Mr. Bumpers, Mr. Harry F. Byrd, Jr., Mr. Huddleston, Mr. Dodd, Mr. Goldwater, Mr. Lugar, Mr. Cochran, Mr. Jepsen, Mr. Kasten, Mr. Humphrey, Mrs. Kassebaum, Mr. Burdick, Mr. Hollings, Mr. Pell, Mr. Armstrong, Mr. Pressler, Mr. Wallop, Mr. Abdnor, Mr. D'Amato, Mr. Andrews, Mr. Symms, Mrs. Hawkins, Mr. Quayle, Mr. Hayakawa, Mr. Ford, Mr. Riegle, Mr. Dixon, Mr. Mitchell, Mr. Zorinsky, Mr. Johnston, Mr. Boren, Mr. Boschwitz, Mr. Heinz, Mr. Inouye, Mr. Chafee, Mr. Nickles, Mr. Glenn, Mr. Matsunaga, and Mr. Cohen) introduced the following bill; which was read twice and referred jointly, pursuant to the order of April 29, 1981, to the Committees on the Judiciary and Governmental Affairs

May 4 (legislative day, April 27), 1981

Ordered further, that when one committee reports the bill, the other committee have thirty days in which to report or be deemed discharged from further consideration

A BILL

To amend the Administrative Procedure Act to require Federal agencies to analyze the effects of rules to improve their effectiveness and to decrease their compliance costs; to provide for a periodic review of regulations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Regulatory Reform Act".

RULEMAKING PROCEDURES

SEC. 2. Section 551 of title 5, United States Code, is amended by adding at the end thereof the following new paragraphs:

"(15) 'emergency rule' means a rule that may be temporarily effective according to the provisions of subsection (b) of section 553 of this title without prior compliance with the provisions of subsections (c) through (g) of section 553 if the agency finds that a delay in the effective date of the rule would—

"(A) seriously injure an important public interest; or

"(B) seriously damage a person or class of persons without serving any important public interest;

"(16) 'major rule'—

"(A) means a rule or a series of closely related rules that causes or is likely to cause—

"(i) an annual effect on the economy of $100,000,000 or more in direct or indirect enforcement and compliance costs;

"(ii) a substantial increase in costs or prices for wage earners, consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

"(iii) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of enterprises whose principal places of business are in the United States to compete in domestic or export markets;

"(B) but does not mean—

"(i) a rule of particular applicability that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures or reorganizations thereof, or accounting practices bearing on any of the foregoing, or a rule that involves the internal revenue laws of the United States;

"(ii) a rule that authorizes the introduction into commerce or recognizes the marketable status of a product or service that, pursuant to statute, could not lawfully be introduced into commerce or marketed in the absence of the rule; or

"(iii) a rule that relates to the property or contracts of the Tennessee Valley Authority;

"(17) 'cost' or 'costs' means potential significant costs, including direct and indirect social costs and effects;

"(18) 'benefit' or 'benefits' means potential significant benefits, including direct and indirect social benefits and effects.".

SEC. 3. Section 553 of title 5, United States Code, is amended to read as follows:

"(a) This section applies to every rule making except as provided in subsection (b).

"(b)(1) This section does not apply, except when notice or hearing is otherwise required by statute, to any—

"(A) rule to the extent that such rule involves a military or foreign affairs function of the United States;

"(B) rule relating exclusively to internal personnel rules and personnel practices of an agency;

"(C) interpretive rule, general statement of policy, or rule of agency organization, procedure, or practice, other than an interpretive rule or general statement of policy that has general applicability and would have a substantial impact on the substantive rights or obligations of persons outside the agency;

"(D) rule for which the agency for good cause finds that notice and public comment are unnecessary due to the routine nature of the matter or the insignificant impact of the rule; or

"(E) emergency rule.

"(2) In the case of a rule for which an agency makes a finding under subparagraph (D) of paragraph (1) of this subsection, the agency shall publish the rule in the Federal Register with a statement of the finding of the agency under such subparagraph and the reasons therefor.

"(3) In any case in which an agency promulgates an emergency rule—

"(A) the agency shall publish the rule in the Federal Register with a statement which describes the emergency necessitating the promulgation of the rule, the reasons why the agency chose the rule promulgated as a response to the emergency, and the reasons why the agency was unable to comply with the provisions of subsections (c) through (g) of this section prior to the promulgation of the rule;

"(B) the agency shall comply with the provisions of subsections (c) through (g) of this section as soon as practicable after the promulgation of the emergency rule; and

"(C) the emergency rule may not be effective longer than a reasonable period necessary to complete agency compliance with subsections (c) through (g) of this section.

"(c)(1) Notice of proposed rule making shall be published in the Federal Register, unless each person subject thereto is named and personally served with notice or otherwise has actual notice thereof in accordance with law. Such notice shall include—

"(A) a statement of the time, place, and nature of the public rule making proceedings;

"(B) a statement of the specific statutory authority under which the rule is proposed and the specific congressional intent sought to be achieved by the rule;

"(C) the proposed provisions of the rule, including a succinct statement of the need for, and the objectives of, the rule;

"(D) a statement that the agency seeks proposals from the public for alternative ways to accomplish the objectives of the proposed rule that are more effective or less burdensome than the approach used in the proposed rule;

"(E) a description of the data, methodology, reports, studies, or other information upon which the agency plans to substantially rely in the rule making, and of the purposes for which the agency plans to rely on such information, including an identification of the authors or sources of such information;

"(F) a statement of where the file of the rule making proceeding maintained pursuant to subsection (f) of this section may be inspected or copies of the file may be obtained at a reasonable cost; and

"(G) a determination of whether the proposed rule is or is not a major rule and a short statement of the basis thereof.

"(2) When the agency publishes a notice of proposed rule making for a major rule, the agency shall also publish—

"(A) a description of the benefits of the proposed rule, including any beneficial effects that cannot be quantified; and an explanation of how the agency anticipates each such benefit will be achieved by the proposed rule, including a description of the persons or classes of persons likely to receive such benefits;

"(B) a description of the costs of the proposed rule, including any adverse effects that cannot be quantified; and an explanation of how the agency anticipates each such cost or adverse effect will result from the proposed rule, including a description of the persons or classes of persons likely to bear such costs or adverse effects;

"(C) a description of reasonable alternatives for achieving the identified benefits of the proposed rule, including alternatives that require no Government action; that will accommodate differences between geographic regions; and that employ standards which permit the greatest flexibility in achieving the identified benefits of the proposed rule; and

"(D) except where the enabling statute pursuant to which the agency is acting directs otherwise, an explanation of how the benefits of the proposed rule are likely to justify the costs and adverse effects of the proposed rule, and an explanation of why the proposed rule is likely to substantially achieve the rule making objectives in a more cost-effective manner than the alternatives to the proposed rule.

"(3) An agency shall describe the nature and extent of the nonquantifiable benefits, costs, and effects of the proposed rule required to be described under paragraph (2) in as precise and succinct a manner as possible. The description of the benefits, costs, and adverse effects of a proposed rule required under paragraph (2) shall include a quantification or numerical estimate of the quantifiable benefits, costs, and effects. Such quantification or numerical estimate shall include an explanation of the margins of error involved in the quantification methods and in the estimates used. The agency evaluations of the relationship of the benefits of a proposed rule to its costs and adverse effects required by this section shall be clearly articulated in accordance with the provisions of this section. An agency is not required to make such evaluation primarily on a mathematical or numerical basis.

"(4) Any supplement to or modification or revision of the notice of proposed rule making that is significant shall be published by the agency in the Federal Register and shall contain the information required by this section.

"(d)(1) After publishing the notice of proposed rule making required by subsection (c) of this section, the agency shall give interested persons not less than sixty days to participate in the rule making through the submission of written data, views, arguments, and statements. The agency may use such other procedures as it determines are appropriate for a particular rule making.

"(2) The agency, by timely notice in the Federal Register, shall extend the time for participation in the rule making for a period of not less than thirty days if—

"(A) such an extension is requested in writing by a participant whose personal rights or economic interests are directly and adversely affected by the proposed rule; and

"(B) such request is received by the agency no less than ten days before the sixty-day period for participation in the rule making has expired, unless this limitation is waived by the agency:

Provided, That no extension of time need be granted if the administrative officer responsible for orderly participation in the proceeding makes a written finding that an extension of time is contrary to the public interest, transmits that finding to the participant requesting the extension, and publishes that finding in the Federal Register within ten days of the receipt of the request for an extension.

"(3) When the agency publishes a notice of proposed rule making for a major rule, the opportunity for participation in the rule making provided by paragraph (1) shall also include an opportunity to make oral presentations of data and information relevant to a significant controversy in the rule making. This opportunity for oral presentations shall include an opportunity for cross-examination only (i) when requested by interested persons for the resolution of material issues of fact and (ii) when other available procedures for the resolution of such issues, including oral and written rebuttal, are determined to be inadequate. The agency may establish reasonable procedures to regulate the course of oral presentations to ensure an orderly and expeditious proceeding.

"(4) When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

"(5) Nothing in this section authorizes the use of appropriated funds available to any agency to pay the attorney's fees or other expenses of persons participating or intervening in agency proceedings.

"(e)(1) Except for rules which grant or recognize an exemption or relieve a restriction, a final rule shall be published in the Federal Register not less than thirty days before its effective date. Publication of a final rule shall be accompanied by a statement of its basis and purpose, which shall include—

"(A) a statement of the need for, and the objectives of, the rule;

"(B) a description of each of the alternatives to the rule which were considered by the agency, and a statement of reasons why each alternative was rejected;

"(C) a memorandum of law supporting the determination of the agency that the final rule is within the authority delegated by law and consistent with congressional intent;

"(D) a succinct explanation of how the factual conclusions upon which the rule is based are substantially supported in the rule making file, including a summary of the assessment made by the agency of the comments presented by the public; and

"(E) a description of the data, methodology, reports, studies, or other information upon which the agency is substantially relying in promulgating the final rule, and of the purposes for which the agency is relying on such information, including an identification of the author or sources of such information.

"(2) When a final major rule is published, the statement of basis and purpose shall also include—

"(A) a description and comparison of the benefits, costs, and adverse effects of the rule; and

"(B) except where the enabling statute pursuant to which the agency is acting directs otherwise, a reasonable determination, based upon the rule making file considered as a whole, that the benefits of the rule justify the costs and adverse effects of the rule, and that the rule will substantially achieve the rule making objectives in a more cost-effective manner than the alternatives described in the rule making.

"(3) The preparation of the notice required by subsection (c), and the preparation of the statement of basis and purpose required by this subsection, including any description or analysis of the benefits, costs, and adverse effects of a proposed rule, shall only be performed by an officer or full-time employee of the agency. This requirement shall not apply to the gathering of information to be used in such notice or statement. If such information is gathered by a source outside of the agency, the agency shall specifically identify, in the notice of proposed rule making or in the statement of basis and purpose, the information gathered and such source, and shall describe the arrangement by which the information was procured by the agency, including the total amount of funds expended for such procurement.

"(4) In promulgating a final rule, the agency may not rely on any written material that was not identified in the notice of proposed rule making unless—

"(A) such material was placed in the rule making file; or

"(B) notice was otherwise given that the agency intends to take notice of information appearing elsewhere, and interested persons were given an adequate opportunity to comment upon such material prior to promulgation of the final rule.

"(f)(1) The agency shall maintain a public file for each rule making proceeding. The file and the material excluded from the file pursuant to paragraph (2) of this subsection shall constitute the rule making record for purposes of judicial review. Except as provided in paragraph (2) of this subsection, the file shall contain all the relevant matter before the agency as a result of the rule making, including—

"(A) the notice of proposed rule making and any supplement to or modification or revision of such notice;

"(B) copies or an identification of the place at which copies may be obtained, at a reasonable cost, of all studies and documentary material upon which the agency substantially relied in formulating the rule;

"(C) all written comments received on the proposed rule;

"(D) transcripts of any oral presentation or cross-examination taking place in the rule making;

"(E) all material that the agency by law is required to make public in connection with the rule making; and

"(F) any statement, description, or analysis required to be prepared by the agency in formulating the rule, including the statement of basis and purpose published by the agency with a final rule pursuant to subsection (e).

"(2) The file required by paragraph (1) of this subsection need not include any material that is exempt from public disclosure under section 552(b) of this title if the agency includes in such file a statement that notes the existence of such material and the basis upon which such material is exempt from public disclosure under such section.

"(3) No court shall hold unlawful or set aside an agency rule because of—

"(i) an inadequacy in the statement required to be published pursuant to paragraphs (2) and (3) of section 553(c) and paragraph (2) of section 553(e), or

"(ii) a failure by the agency to afford an opportunity for cross-examination pursuant to subsection (d)(3) of this section,

unless the court finds, upon review of the whole rule making record, that such inadequacy or failure renders the rule unlawful under section 706(a)(2) (A), (B), or (C) of this title.

"(4) Any analysis of a proposed or a final rule required by another provision of this title or by another statute may be included in the notice of proposed rule making and in the statement of basis and purpose published with a final rule under this section to the extent that such analysis satisfies, or is not inconsistent with, the requirements of this section.

"(g) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.".

REGULATORY REVIEW

SEC. 4. (a) Subchapter II of chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new section:

"§560. Review of agency rules

"(a)(1) Not later than nine months after the effective date of this section, each agency shall prepare and publish in the Federal Register for comment by interested persons a proposed schedule for the review, within a ten-year period beginning on the effective date of this section, of each major rule in effect on such date.

"(2) At least ninety days before publishing the proposed schedule in the Federal Register, each agency shall make the proposed schedule available to the President or an officer designated by him. Each proposed schedule shall contain a brief explanation of the reasons the agency considers each rule on the schedule to be a major rule and shall include a date set by the agency for the completion of the review of each such rule. The agency shall set a date for initiation of review of each item on the schedule in a manner to ensure the simultaneous review of related items and to achieve a reasonable distribution of reviews over the period of time covered by the schedule. The President or an officer designated by him may select additional rules to be reviewed pursuant to subsection (c) of this section.

"(3) Not later than one year after the effective date of this section, each agency shall publish in the Federal Register a final schedule for the review of the rules referred to in paragraphs (1) and (2). Each agency shall publish the response of the agency to comments received concerning the proposed schedule with the final review schedule.

"(4) Except where explicitly provided otherwise by statute or where an extension has been granted pursuant to subsection (f), each major rule that is in effect on the date of enactment of this section shall be reviewed by the agency within ten years of the date of enactment of this section. Pursuant to such review, the agency shall determine to renew, amend, or rescind that rule.

"(b)(1) Except where explicitly provided otherwise by statute or where an extension has been granted pursuant to subsection (f), each major rule promulgated, amended, or otherwise renewed by an agency after the date of enactment of this section shall be reviewed by the agency within ten years of the date on which such a rule becomes effective Pursuant to such review, the agency shall determine to renew, amend, or rescind that rule.

"(2) The President or an officer designated by him may select additional rules that were promulgated by an agency after the date of enactment of this section to be reviewed pursuant to subsection (c) of this section.

"(c) An agency shall publish in the Federal Register a notice of its proposed action regarding a rule being reviewed. The notice shall include—

"(1) an identification of the specific statutory authority under which the rule was promulgated and a determination of whether the rule continues to fulfill the intent of Congress enacting that authority;

"(2) an assessment of the benefits, costs, and adverse effects of the rule during the period in which it has been in effect;

"(3) an explanation of the proposed agency action with respect to the rule;

"(4) for a rule that the agency determines no longer falls within the definition of a major rule, or for a rule that the agency proposes to renew with modifications that would exclude the rule from the definition of a major rule, an explanation of the determination or proposal; and

"(5) a statement that the agency seeks proposals from the public for modifications or alternatives to the rule which may accomplish the objectives of the rule in a more effective or less burdensome manner.

"(d) If an agency proposes to rescind or amend the rule, after issuing the notice required by this subsection the agency shall comply with the provisions of section 553 of this chapter; and the requirements of that section and related requirements of law shall apply to the same extent, and in the same manner, as in the case of a proposed agency action which is not taken pursuant to the review required by this section.

"(e) If an agency proposes to renew the rule without amendment, the agency shall—

"(1) give interested persons not less than sixty days after the notice required by this subsection to comment on the renewal; and

"(2) publish the renewed rule in the Federal Register at least thirty days prior to the date on which the renewal of the rule is to become effective with an explanation of the reasonable determination of the agency that the rule continues to comply with the provisions of subsection (e)(2)(B) of section 553.

"(f)(1) Any agency, which for good cause finds compliance with this section with respect to a particular rule to be impracticable during the period provided in subsection (a) or (b), may request the President, or an officer designated by him, to establish a period longer than ten years for the completion of the review of such rule. The President or an officer designated by him may extend the period for review of a major rule to a total period of not more than fifteen years. Such extension shall be published in the Federal Register with an explanation of the reasons therefor.

"(2) An agency may, with the concurrence of the President or an officer designated by him, amend any schedule required by this section for the review of rules if such amendment is published in the Federal Register.

"(g) In any case in which an agency has not completed the review of a major rule within the period prescribed by subsection (a), (b), or (f), the agency shall immediately publish a notice proposing to withdraw or renew the rule under subsection (c), and shall complete proceedings pursuant to subsection (d) within one hundred and eighty days of the date on which the review was required to be completed under subsection (a), (b), or (f).".

(b) The table of sections for such chapter is amended by inserting after the item relating to section 559 the following new item:

"560. Review of agency rules.".

JUDICIAL REVIEW

SEC. 5. Section 706 of title 5, United States Code, is amended to read as follows:

"§706. Scope of review

"(a) To the extent necessary to decision and when presented, the reviewing court shall independently decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

"(1) compel agency action unlawfully withheld or unreasonably delayed; and

"(2) hold unlawful and set aside agency action, findings and conclusions found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

"(D) without observance of procedure required by law;

"(E) unsupported by substantial evidence in a proceeding subject to sections 556 and 557 of this title or otherwise reviewed on the record; or

"(F) without substantial support in the rule making file, viewed as a whole, for the asserted or necessary factual basis, as distinguished from the policy or legal basis, of a rule adopted in a proceeding subject to section 553 of this title; and

"(G) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

"(b) In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

"(c) In making determinations under clause (2)(C) of subsection (a) of this section, the court shall require that action by the agency is within the scope of the agency jurisdiction or authority on the basis of the language of the statute or, in the event of ambiguity, other evidence of legislative intent. In making determinations on other questions of law, the court shall not accord any presumption in favor of or against agency action.".

VENUE

SEC. 6. Section 2112 of title 28, United States Code, is amended by deleting the last three sentences of subsection (a); redesignating subsections (b), (c), and (d) as subsections (c), (d), and (e), respectively; and inserting the following as new subsection (b):

"(b)(1) If proceedings have been instituted in two or more courts of appeals with respect to the same order and the first such proceeding was instituted more than ten days before the second, the record shall be filed in that court in which the proceeding was first instituted. If the first such proceeding was not instituted more than ten days before the institution of a second proceeding with respect to the same order, the agency, board, commission, or officer concerned shall promptly advise in writing the Administrative Office of the United States Courts that such multiple proceedings have been instituted. Pursuant to a system of random selection devised for this purpose, the Administrative Office thereupon shall select the court in which the record shall be filed. Upon notification of such selection, the agency, board, commission, or officer concerned shall promptly file the record in such court.

"(2) Where proceedings have been instituted in two or more courts of appeals with respect to the same order and the record has been filed in one of such courts pursuant to paragraph (1), the other courts in which such proceedings are pending shall promptly transfer such proceedings to the court of appeals in which the record has been filed. Pending such transfer, any court in which a proceeding has been instituted shall have jurisdiction to grant preliminary relief. Any order granting such relief shall be subject to reconsideration in the court to which the proceeding is transferred.

"(3) Any court in which a proceeding with respect to any order is pending, including any court selected pursuant to paragraph (1), may transfer such proceeding to any other court of appeals for the convenience of the parties or otherwise in the interest of justice.".

REGULATORY AGENDA AND CALENDAR

SEC. 7. (a) Subchapter II of chapter 5 of title 5, United States Code, is further amended by adding at the end thereof the following new section.

"§ 561. Regulatory agenda and calendar

"(a) Each agency shall publish in the Federal Register in April and October of each year an agenda of the rules that the agency expects to propose, promulgate, renew, or withdraw in the succeeding twelve months. For each such rule, the agenda shall contain, at a minimum, and in addition to any other information by law—

"(1) a general description of the rule, including a citation to the authority under which the action is to be taken, or explanation of the specific congressional intent to which its objectives respond;

"(2) a statement of whether or not the rule is a major rule within the meaning of paragraph 16 of section 551 of this title;

"(3) an approximate schedule for the significant action dates relating to the rule, including the dates for any notice of proposed rule making, hearing, and final action on the rule; and

"(4) the name, address, and telephone number of an agency official responsible for answering questions from the public concerning the rule.

"(b) The President or his designee shall publish in the Federal Register in May and November of each year a Calendar of Federal Regulations listing each of the major rules identified in the regulatory agendas published by agencies in the preceding months. Each rule listed in the calendar shall be accompanied by a summary of the information relating to the rule that appeared in the most recent regulatory agenda in which the rule was identified.

"(c) An agency may propose or promulgate a major rule that was not listed in the regulatory agenda required by subsection (a) of this section only if it publishes with the rule an explanation of the omission of the rule from such agenda and otherwise complies with this section with respect to that rule.

"(d) Any determination by an agency concerning the applicability of this section to any action of the agency shall not be subject to judicial review.".

(b) The table of sections for such chapter is amended by inserting at the end thereof the following new item:

"561. Regulatory agenda and calendar.".

EFFECTIVE DATE

SEC. 8. (a) The amendments made by sections 2, 3, and 5 of this Act shall take effect on January 1, 1983, and shall apply to any rule making proceeding for which a notice of proposed rule making has been issued after such date.

(b) The amendment made by section 4 of this Act shall take effect six months after the date of enactment of this Act and shall apply according to the provisions thereof.

(c) The amendment made by section 6 of this Act shall take effect three months after the date of enactment of this Act and shall apply, according to the provisions thereof, to review proceedings instituted after such date.

(d) The amendment made by section 7 of this Act shall take effect six months after the date of enactment of this Act and shall apply according to the provisions thereof.

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

July 15, 1981

TO : Honorable William V. Roth
Attn: Dan Bensing

FROM : American Law Division

SUBJECT : Analysis of Effect of Supreme Court's Cotton Dust Decision on Executive Order 12291 and S. 1080

This is in response to your request that we analyze the Supreme Court's holding in American Textile Manufacturers' Institute v. Donovan, No. 79-1429, United States Supreme Court, June 17, 1981 (the Cotton Dust Case) and its possible effect on the implementation and application of Executive Order 12291 and on the provisions of S. 1080, the Regulatory Reform Act.

I. THE COTTON DUST DECISION

This case involved a challenge by textile manufacturers and their trade association to a standard issued by the Occupational Safety and Health Administration (OSHA) to protect workers in the industry from exposure to cotton dust which causes byssinosis or brown lung disease. The industry contended that in promulgating the standard OSHA was required by the Act to determine that the costs of the issued standard bore a reasonable relationship to its benefits, or, stated differently, to demonstrate that the reduction in risk of material health impairment was significant in light of the costs of attaining the reduction. OSHA, on the other hand, interpreted the Act to require the adoption of the most stringent standard to protect against material health impairment, bounded only by considerations of technological and economic feasibility.

The Court held that standards dealing with toxic materials or harmful physical agents promulgated pursuant to section 6(b)(5), 29 U.S.C. 655(b)(5) (1976), are not required to be subjected to cost-benefit analysis. According to the majority of the Court, the statute makes it clear that Congress itself had already determined the cost-benefit calculus. By section 6(b)(5), Congress directed the Secretary of Labor, through OSHA, to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence that no employee will suffer material impairment of health or functional capacity. . . ." Feasible, the Court said, meant capable of being done, executed, or effected. Thus Congress had directed that the only limit imposed on standards to be issued was that they not require the doing of something impossible, that they be capable of effectuation. "In effect then, . . . Congress itself defined the basic relationship between costs and benefits, by placing the 'benefit' of worker health above all other considerations save those making attainment of this 'benefit' unachievable." Slip opinion at 16-17. Reviewing the legislative history of the Act, the Court found this interpretation of section 6(b)(5) supported by floor statements and committee reports.

Justice Rehnquist, joined by the Chief Justice, dissented on the ground that Congress had delegated authority to the Secretary without any meaningful standard, by leaving the crucial policy choices to the Secretary. "[I]n so doing, Congress unconstitutionally delegated its legislative responsibility to the Executive Branch." Justice Stewart dissented because he thought the OSHA estimate of cost feasibility was not supported by the record evidence.

The significance of Cotton Dust for present purposes is in its recognition that cost-benefit analysis is ultimately a question of legislative intent with respect to the crucial question whether it must be, may be, or cannot be imposed as part of an agency's decisionmaking process. Thus the Cotton Dust decision resolves this issue only for OSHA, and, even more narrowly, for OSHA health and safety "standards dealing with toxic materials or harmful physical agents." Indeed, read most strictly, the ruling expressly settles only whether the agency is required to use cost-benefit analysis, not whether it is permissible for it to do so in its discretion. This would seem too narrow a reading, however, since the Court seems clearly of the view that "[a]ny standard based on a balancing of costs and benefits by the Secretary that strikes a different balance than that struck by Congress would be inconsistent with the command set forth in section 6(b)(5)." Slip opinion at 17.

II. EFFECT OF COTTON DUST ON EXECUTIVE ORDER 12291

Even before the Cotton Dust ruling some questions had been raised as to whether the substantive orientation of Executive Order 12291's provisions taken together with the substantial enforcement authority of the Director of the Office of Management and Budget could effect an unlawful displacement of discretionary authority vested by Congress with agency officials. See Presidential Control of Agency Rulemaking: An Analysis Of Constitutional Issues That May Be Raised by Executive Order 12291 (CRS, June 15, 1981). Cotton Dust would appear to add further concerns with respect to its implementation. Thus it has been the presumption of the administrators of the Order that if a statute on its face did not expressly preclude cost-benefit assessment, the Director could mandate such an analysis under his direction. It is now possible to argue that as a result of Cotton Dust each agency's statutory authority, including its legislative history will have to be examined carefully to determine whether Congress has given any indication of its preference with respect to that which must be, may be, or may not be part of the agency's decisionmaking process.

Stated differently, it may no longer suffice, if it ever did, to look for the presence or absence of cost-benefit language in the text of the statute. Courts may now give significance to statutory language or legislative history reflecting a congressional predilection for another mode of analysis which may be read to preclude all other methodologies. Certainly one cannot ignore the Court's cryptic comments that "[w]hen Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute," (Slip Opinion at 17-18), and that "[t]hese and other statutes demonstrate that Congress uses specific language when intending that an agency engage in cost-benefit analysis." Slip Opinion at 18-19. These comments may be taken as a rule of construction that the Court will not presume a requirement of cost-benefit analysis unless there is clear statutory language to that effect. Or it could have been used in juxtaposition to the "extent feasible" phrase of section 6(b)(5) to demonstrate that Congress knew what it was doing when it used the term "feasible" rather than terminology more clearly mandating cost-benefit assessment.

In any event, until the Court clarifies its meaning in some future decision, it seems clear that more sophisticated exercises in statutory construction and legislative history analysis may be required. This is so because account will now have to be taken of a variety of analytic terms dealing with economic assessments, none of which have a stable, definable content and whose meaning may vary from one statutory context to another. Three such analytic requirements -- cost-benefit analysis, economic impact analysis, and cost effectiveness -- were recently researched to determine the frequency they appear in the United States Code. The study identified some 200 such instances. See R. Jeweler and T. Carr, Survey of United States

Code Provisions Containing Requirements For Cost-Benefit, Economic Impact, Or Cost Effectiveness Analysis (CRS, April 27, 1981).

Each of the terms surveyed generally has a content exclusive of the other. The term "cost-benefit analysis" implies that the benefits of the action are compared to the costs, while "economic impact analysis" suggests that the economic consequences of an act be deliberately considered, without necessarily weighing the merits, which may be predetermined or implicit. "Cost effectiveness" requires determining which of any given alternatives can most efficiently, economically or effectively be employed to achieve a previously determined goal. The appearance of one of these terms in a statute thus may serve to preclude utilization of either of the others. Again much will depend on the context in which it appears and any light the statute's history may be able to shed.

In sum, then, Cotton Dust may have opened up a host of new considerations that may complicate or thwart implementation of the Order either because of confusion as to which analytic tool to use, if any, or as a result of litigation that may be encouraged because of the uncertainty created.

III. EFFECT OF COTTON DUST ON S. 1080

Substantially what has been said in section II is applicable here. Note must be taken that, as introduced, S. 1080 does not contain a central coordinating agency which can define and enforce the requirements of the proposed bill which is analogous to that contained in Executive Order 12291. The agencies are left on their own for the most part. Thus an agency which has an "economic impact" requirement in its enabling legislation may decide on its own that this is a provision which "directs otherwise" and thereby exempt itself from the requirements of sections 553(c)(2) and (3) or 553(e)(2) of Title 5, U.S. Code, the Administrative Procedure Act.

IV. STATUTORY PROVISIONS SIMILAR TO OSHA SECTION 6(b)(5)

We take this question to mean the identification of statutory provisions in which Congress has already made the cost-benefit assessment and has directed a course of action oblivious to cost. Three examples may be cited. First is the national ambient air standards of the Clean Air Act, 42 U.S.C. 7409(b)(1) (Supp. II 1978):

> **(b) Protection of public health and welfare**
>
> (1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

Second is the fishable/swimmable criteria of the Clean Water Act, 33 U.S.C. 1251(a)(2) (1976):

> **§ 1251. Congressional declaration of goals and policy**
>
> (a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter— . . .
>
> . . .
>
> (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

Finally, we may cite the Delaney Clause, 21 U.S.C. 348(c)(3)(A):

> (3) No such regulation shall issue if a fair evaluation of the data before the Secretary—
>
> (A) fails to establish that the proposed use of the food additive, under the conditions of use to be specified in the regulation, will be safe: *Provided,* That no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal, or if it is found, after tests which are appropriate for the evaluation of the safety of food additives, to induce cancer in man or animal, except that this proviso shall not apply with respect to the use of a substance as an ingredient of feed for animals which are raised for food production, if the Secretary finds (i) that, under the conditions of use and feeding specified in proposed labeling and reasonably certain to be followed in practice, such additive will not adversely affect the animals for which such feed is intended, and (ii) that no residue of the additive will be found (by methods of examination prescribed or approved by the Secretary by regulations, which regulations shall not be subject to subsections (f) and (g) of this section) in any edible portion of such animal after slaughter or in any food yielded by or derived from the living animal; or

None of these programs would appear to be affected by the Cotton Dust decision.

If you are in need of further clarification or elaboration of any point covered, or for any further information, please do not hesitate to call.

A copy of the Jeweler and Carr study accompanies this memorandum for your convenience.

Morton Rosenberg/RCP

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PRESIDENTIAL CONTROL OF AGENCY RULEMAKING: AN ANALYSIS OF CONSTITUTIONAL ISSUES THAT MAY BE RAISED BY EXECUTIVE ORDER 12291

SUMMARY

President Reagan's Executive Order 12291 establishes for the first time a centralized mechanism for presidential management of agency rulemaking activities with substantial authority for meaningful intervention into and direction of the process at all stages. Under the Order, designated presidential agents are, among other things, authorized to be part of an agency's rule formulation process in order to determine whether a proposed or existing rule is "major" or not. If it is, they may subject a proposed rule to prescribed substantive cost-benefit evaluation requirements and delay its effectiveness as a final rule. If it is a rule currently in effect, it may be subjected to similar cost-benefit reassessment. Or, there may be a waiver of all requirements of the Order with respect to proposed or existing major rules. Guidelines and standards for administration of the operation of the Order are to be issued by the Director of the Office of Management and Budget (OMB), subject to review by the Presidential Task Force on Regulatory Relief and final appeal to the President.

The scheme of the Order, in scope and substance, is a marked departure from previous presidential efforts to control administrative lawmaking. It does not appear to draw its authority from any specific congressional enactment; indeed, the Order itself refers only to "the authority vested in me as President by the Constitution and laws of the United States of America." A Department of Justice opinion released with the Order concludes that it is "acceptable as to form and legality" relying almost exclusively on the President's constitutional duty to "take care that the laws be faithfully executed" and the interpretation given that clause by Chief Justice Taft in Myers v. United States and on a reading of the Order to the effect that none of its procedural or substantive requirements would wholly displace a discretionary function placed in a subordinate executive officer by the Congress. The memorandum cites no statutory authority directly supporting the President's action, but points to the Order's disavowal of its applicability where it is contrary to law, and its insistence that it "is intended only to improve the internal management of the Federal government."

An initial review of the Order indicates that several serious legal issues might be raised with respect to it. Thus it might be contended that the Order exceeds the President's independent authority under Article II to "guide and supervise" executive officers in the exercise of their administrative discretion because it in fact displaces such discretion; conflicts with the purpose and design of the Administrative Procedure Act; and fails to provide adequate procedural safeguards to protect the integrity of the rulemaking process. As the memorandum does not appear to address these issues or to take full account of the potential breadth and effect of the Order, the Report undertakes to construct a full articulation of the President's legal position in this matter which may be summarized as follows.

The President's authority to coordinate the administration and execution of the laws is founded in the Constitution, historical practice, and the common sense practicalities of modern government. Thus, Article II vests in the President the powers of appointment and removal, the power to demand written opinions from subordinate executive officers, and the right to invoke executive privilege to protect consultative privacy, for the purpose of ensuring the President's effective supervision over the Executive Branch. The Supreme

Court has confirmed that these powers, together with his constitutional duty to "take Care" that the laws are faithfully executed, make it clear that the President was meant to have the exclusive responsibility to execute the law through agents who are in turn responsible to him. Otherwise the constitutional goals of accountability and efficiency implicit in the creation of a single Executive would be thwarted.

Congressional practice also makes evident the recognition of the President's central management role. the Chief Executive has been given effective control over agency budgets, legislative proposals, and information gathering from the public, and is not specifically precluded by the Administrative Procedure Act or other law from participating in the informal rulemaking process. Moreover, recent legislative efforts to perfect procedural safeguards in rulemaking by prohibiting ex parte contacts and requiring rulemaking on the record have not been extended to informal rulemaking, an indication of acquiescence in the possibility, if not the fact, of presidential intervention in the process.

Further, the practical realities of administrative rulemaking, and modern government generally, demand Executive coordination and supervision. Rulemaking today tangibly touches and effets all aspects of society. Our form of government simply cannot function effectively, efficiently, or rationally if key administrative policymakers are isolated from each other and the President. Only the President with his overall view can provide the unified, coordinated direction necessary to integrate policy administration. Therefore, only the clearest direction of Congress to insulate an officer's discretion will suffice to preclude executive guidance and supervision.

Executive Order 12291 does no more than rationalize management direction over the Executive Branch rulemaking process. The Order does not interfere with the decisional role assigned by Congress to subordinate executive officers since ultimate authority always remains with those officials. Also, formalization of the supervisory structure opens it to public scrutiny more than ever before and focuses responsibility on the President and his principal management agent. With the availability of judicial review, procedural due process rights of participants and the integrity of the rulemaking process are fully preserved and protected.

The Report then presents the legal position that may be advanced against the President's position. It would argue that a close examination of Executive Order 12291 raises a serious question whether the purpose and effect of its scheme, taken as a whole, is to establish substantive control over the process of informal rulemaking. That object seems evident in its central focus on cost-benefit analysis. Thus agency action that involves the promulgation of new rules, review of old rules, or the development of legislative proposals concerning regulation may be undertaken only if societal benefits will outweigh the costs of the action. Operational oversight authority is placed in the Director of OMB who has a formidable array of powers to accomplish that goal. All rules must be reviewed by the Director and he decides which are major based on the definition supplied by the Order and supplemental criteria he is authorized to devise. The proposing agency is then required to prepare a preliminary cost-benefit analysis based upon a methodology designed by the Director. The Director may require the agency to obtain and evaluate any additional relevant data from any appropriate source designated by the Director. He may require consultation with other agencies or with himself. He can also direct the agency to refrain from publishing the proposed rule and RIA for an indefinite period. Once the proposal and RIA are allowed to be published and the period for public comment is concluded, a similar review process for a final RIA begins. Publication of the rule in final form again may be delayed indefinitely.

Existing rules are also subject to OMB review. Here the Director may designate a rule or set of rules as major and require that they be subjected to cost-benefit analysis, again according to the Director's prescribed methodology. The review must be accomplished within a schedule set by the Director. Although the existing rule review process does not specifically require that cost-ineffective rules be modified or repealed, there would appear no other purpose for the exercise.

Finally, the Director has authority to waive all the requirements of the Order. There is no standard to guide either the exercise of the waiver or deferral authority; nor is there time limit on the length of any deferral by the Director.

The Order therefore appears to establish a formal, comprehensive, centralized, and substantively oriented system of control of informal rulemaking that is without precedent. While it might be argued that a requirement to utilize cost-benefit principles, standing alone, is procedural, the extra-agency definition of such principles and the requirement that they be applied, supported by an effective enforcement mechanism, appears to belie a simple procedural purpose. The prescription of such principles is conceded to be substantive by the Department of Justice and in the context of the unfettered authority that may be wielded under the Order, the inevitable effect could be the displacement of ultimate agency discretion in contravention of any statute vesting discretionary rulemaking authority in an agency official.

The scheme of the Order arguably would also bring it in direct conflict with the Administrative Procedure Act. The legislative history of that Act establishes that its dominant purpose was to create a novel form of rulemaking that in its flexibility and informality could be tailored to meet the individualized situations that are encountered by agencies with markedly different missions. The framers of the Act specifically rejected proposals that would have imposed government-wide rulemaking procedures that were uniform and highly judicialized. Thus, in section 553 the focus is on the individual agency. There is neither a role for, nor even a mention of, the President in the Act, or its legislative history. The clear intent is to emphasize maximum flexibility and informality free of any extra-agency control in order to bring to bear agency expertise on situations in a fair and expeditious manner. The procedures required are spare and value neutral.

Executive Order 12291 could be said to defeat the intent of the APA by superimposing on section 553 a scheme that establishes a central supercoordinate of unilaterally created uniform, substantively oriented procedures. The Order removes from the hands of the individual agencies not only the method and means of informal rulemaking but, effectively, the statutorily reserved prerogative of an agency to decide whether or not to make a rule. As a consequence, the character of informal rulemaking is irresistably altered. The practice of independent in-house agency rule development prior to public notification is substantially displaced and agency freedom to experiment with procedures and methods of self-education before issuance of a final rule may be superfluous. At the very least, both appear subservient to the dominant focus on cost effectiveness analysis.

Another concern that may be raised by the design of the Order is the possibility that in funneling all agency rules through one coordinating entity, OMB, a new access or entry point to the decisionmaking process is now available for persons interested in influencing the outcome of a particular rulemaking. Since this Order provides no explicit safeguards to protect the integrity of the process or the interest of the public against secret, undisclosed, and unreviewable contacts, it may be argued that the Order, on its face, deprives participants of essential elements of fair treatment required by due process. In particular, in view of the fact that the President's closest managerial agent is the operational head of this sensitive access point, there may be said to be an invitation to the President and White House aides to make their views felt in an effective manner. Similarly, non-governmental interest may attempt to utilize the White House or OMB as a conduit for their views and thereby covertly influence the agency. In such instances there is usually neither knowledge of the contact or what was communicated and thus no opportunity to rebut, nor an appropriate record for court review. In the past the courts have recognized and extended due process protections normally associated with adjudicatory proceedings to rulemaking and other informal executive actions to guard against improper governmental and non-governmental influences in agency policymaking.

Following a critical analysis of the two opposing positions the Report concludes, first, that Executive Order 12291, in establishing a central coordinating agency for the process of informal rulemaking, and by vesting it with authority to create and enforce substantively oriented procedures designed to direct and control that process, appears to conflict with the intent of Congress in enacting the Administrative Procedure Act and the scheme of informal rulemaking provided for in section 553 of that Act. There is, therefore, a substantial risk that a court challenge to a rule promulgated pursuant to that Order , or to the Order itself, may succeed on the ground that the President exceeded his authority in issuing the Order.

Second, taking the provisions of Executive Order 12291 as an integral whole, in the context of the stated goals of the Order, and viewing them in the light of the reasonably foreseeable consequences of the Director's exercise of the enforcement mechanisms of the Order, a serious question is raised whether the discretionary authority of agency decisionmakers may be totally displaced in violation of Congressional delegations of rulemaking authority.

Third, it may be argued that the Order, by centralizing authority over informal rulemaking in OMB and requiring it to be the sole clearinghouse for all covered rules, has created a critical access point to the agency decisionmaking process without providing safeguards against secret, undisclosed, and unreviewable contacts by governmental and non-governmental interests seeking to influence the substance of agency action. If so, a court might rule, based upon a body of recent judicial precedent, that the Order's failure to protect the integrity of the policymaking process in the interest of the public from such influences on its face deprives interested persons of their due process rights to a meaningful participation in the decisionmaking process, to a reasoned agency decision based on some kind of record, and the possibility of effective judicial review.

PRESIDENTIAL CONTROL OF AGENCY RULEMAKING: AN ANALYSIS OF CONSTITUTIONAL ISSUES THAT MAY BE RAISED BY EXECUTIVE ORDER 12291

INTRODUCTION

By the promulgation of Executive Order 12291,[1] President Reagan has seized the initiative in the current movement to control rulemaking by administrative agencies. The Order establishes for the first time a centralized mechanism for presidential management of agency rulemaking activities with substantial authority for meaningful intervention into and direction of the process at all stages. Under the Order, designated presidential agents are, among other things, authorized to be part of an agency's rule formulation process in order to determine whether a proposed or existing rule is "major" or not. If it is, they may subject a proposed rule to prescribed substantive evaluation requirements and delay its effectiveness as a final rule. If it is a rule currently in effect, it may be subjected to similar substantive reassessment. Or, there may be a waiver of all requirements of the Order with respect to proposed or existing major rules. Guidelines and standards for administration of the operation of the Order are to be issued by the designated presidential agents.

The scheme of the Order, in scope and substance, is a marked departure from previous presidential efforts to control administrative lawmaking. It does not appear to draw its authority from any specific Congressional enactment; indeed, the Order itself refers only to "the authority vested in me as

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1/ 46 F.R. 13193 (February 17, 1981). The full text of the Order is set forth as Appendix A of this report.

President by the Constitution and laws of the United States of America." Published reports indicate that the Order will be vigorously implemented.[2/]

If the stated purposes[3/] of the President's Order are effectively pursued, there can be little doubt that members of public who perceive themselves adversely effected by the change in the rulemaking process will seek judicial relief and that the interest of Members of Congress will be attracted. Less formalized Executive intervention into agency decisionmaking processes in the past has engendered both court action[4/] and Congressional hearings.[5/] But the legal basis of those protests were essentially confined to the question whether the ad hoc involvement of the President or his agents in a particular agency proceeding was an ex parte contact which tainted that process by the appearance or fact of impropriety or unfairness to other participants. However, the nature and breadth of the President's action here--an executive order establishing a formal, comprehensive, and centralized system for

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[2/] Deregulation HQ, An Interview with Murray L. Weidenbaum and James C. Miller III, Regulation, March/April 1981, pp. 14-23 (hereinafter Interview); Bush Fingers 27 Regulations for Possible Early Death, National Journal, March 28, 1981, p. 543; OMB to Keep Its Regulatory Powers in Reserve in Case Agencies Lag, National Journal, March 14, 1981, pp. 424-429; "Planned 9-digit ZIP code gets message from OMB", Washington Post, May 27, 1981, p. 3.

[3/] The preamble to the Order states that it has been issued "in order to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations...."

[4/] See, e.g., Sierra Club v. Costle, No. 1565, D.C. Cir., April 29, 1981; In re Permanent Surface Mining Regulation Litigation, 13 Envir. Rep. (BNA) 1586 (D.D.C. 1979); Natural Resources Defense Council v. Schultze, 12 Envir. Rep. (BNA) 1737 (D.D.C. 1979).

[5/] U.S. Senate, Committee on Environment and Public Works, Subcommittee on Environmental Pollution, "Hearings on Executive Branch Review of Environmental Regulations", 96th Cong., 1st Sess. (1979); U.S. Senate Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, "Hearings on Regulatory Reform", Part 2, pp. 403-425, 96th Cong., 1st Sess. (1979).

management of the process of administrative lawmaking--coupled with effective enforcement potential, injects a legal issue of far greater dimension and import, the question whether there is a lawful basis for what the President has done. Stated more directly, the question raised is whether the President in promulgating Executive Order 12291 has engaged in an exercise of executive lawmaking without either constitutional or statutory authority and thereby violated the separation of powers doctrine.

This report will approach this complex and sensitive issue of the President's constitutional authority in the following manner. First, it will sketch the historical antecedents which appear to have led to the issuance of Executive Order 12291, with particular emphasis on the evolution of the present roles Congress, the Executive, and courts are playing in controlling administrative action. Part II will describe in detail the scheme established by the Order and analyze the legal justification for it put forth by the Department of Justice. Part III will identify the legal questions that may be raised with respect to the President's power to establish such a mechanism through the vehicle of an executive order and detail the arguments and authorities which support the President's action. Part IV will then present the legal case in opposition to the validity of the scheme, including a critical analysis of the stated and unstated assumptions that may underlie the Executive's position. The report will conclude by weighing the competing considerations and attempting to reach a reasoned conclusion on the merits of the issue.

I. BACKGROUND: THE INSTITUTIONAL RESPONSES TO INCREASED GOVERNMENTAL INTERVENTION AND REGULATION SINCE THE 1930's

A. Judicial Legitimization of Broad Legislative Delegations of Authority

The call for restraint and reversal of what has been seen by some as an inexorable pattern of pervasive governmental intervention into private activity has become a dominant theme of our nation's domestic politics. In the last two presidential campaigns the issue of control of the administrative bureaucracy has been prominent if not pre-eminent. The rubric of "regulatory reform" has become a rallying cry for interest groups and academics as well.

The critical institutional development that has been the focal point of reformist concern has been the increased devolvement since the 1930's of broad legislative responsibility on the organs of administration. The Congressional practice of delegating lawmaking authority has resulted in a vast proliferation of administrative legislation affecting the conduct of economic and social relationships which currently dwarfs the Congressional output.

The Supreme Court's initial reaction to this practice was to invoke, for the first time, the non-delegation doctrine to strike down New Deal legislation which it found failed to constrain the President's authority within definable limits.[6] This potential inhibition on standardless Congressional delegations was short-lived, however. Since 1937, in the face of a continued practice of loosely confined delegations, neither the Supreme Court nor any other federal court has invoked the doctrine. In thus legitimizing broad delegations the courts have interpreted the standards requirement as mandating merely that a statute, its explicit or reasonably discernible purposes, or the administrative practices under it, taken together, provide the administrator with sufficiently clear guidance that a court reviewing the administrator's action can "ascertain whether the will of Congress has been obeyed."[7] While it cannot be said that the courts have abandoned oversight of agencies' discretionary exercise of delegated authority, the inherent limitations of the current mode of sporadic and piecemeal judicial supervision, absent a revival of the non-delegation doctrine, has meant that the courts do not present a significant inhibitory threat to standardless delegations.

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[6] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

B. The Congressional Response to the Call for Restraints on Administrative Discretion

The response of the Congress to the mounting pressure for effective control over the administrative process has been fitful, uneven, and until recently, limited in scope. Congress, for example, has effected partial deregulation of several industries,[8] imposed regulatory analysis requirements with respect to certain rulemakings,[9] and required clearance for the information gathering efforts of Executive agencies.[10] Where an agency has been perceived as overstepping its mandate, it has been legislatively punished by imposing strict policy directives and subjecting it to special review procedures.[11] Its principal response to critics of its manner of carrying out its legislative responsibilities, however, has not been to be more detailed in its lawmaking or to withdraw or constrict past delegations but rather to turn, with increasing frequency, to some form of the legislative veto.

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[7] Yakus v. United States, 321 U.S. 414, 425 (1944); see also, Lichter v. United States. 334 U.S. 742 (1948); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971)(3-judge court).

[8] Airline Deregulation Act of 1978, Pub. L. 95-504; Motor Carrier Act of 1980, Pub. L. 96-296.

[9] Regulatory Flexibility Act, Pub. L. 96-354, 5 U.S.C. 601 et seq.

[10] Paperwork Reduction Act of 1980, Pub. L. 96-511, 44 U.S.C. 3501 et seq.

The rapidly burgeoning extent of that reliance is dramatic. Since 1932, 190 acts of Congress have contained 269 separate provisions giving the legislature direct review powers. Of that number, substantially more than half have been enacted since 1970. In 1980 alone 17 acts with a total of 38 veto provisions were passed.[12] Moreover, the nature and scope of the review has markedly changed. In the past such provisions have usually been selective, directed to some or all actions encompassed by a particular statute or program. However, recent Congressional consideration has focused on proposals of a vastly broader sweep. In May 1980 all trade regulation rules of the the Federal Trade Commission were made the object of legislative scrutiny.[13]

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[11] Federal Trade Commission Improvements Act of 1980, Pub. L. 96-252.

[12] Briefly, a legislative veto is a statutorily authorized means by which the Congress, or a part of it, such as one House, a committe, or a committee chairman, may subject proposals for Executive action pursuant to statute to further legislative consideration and control. In its most controversial form, a proposal must be either reformulated or abandoned. But common to all varieties of the veto mechanism is the inability of the President to counter-veto a congressional rejection.

For a comprehensive compilation of legislative veto provisions see Norton, Congressional Review, Deferral, and Disapproval of Executive Actions: A Summary and Inventory of Statutory Authority (CRS, April 30, 1976); Norton, 1976-1977 Congressional Acts Authorizing Prior Review, Approval, and Disapproval or Proposed Executive Actions (CRS, May 25, 1978); Norton, 1979 Acts Authorizing, Approval or Disapproval, or Requiring Advance Notice, of Proposed Executive Actions, Rules and Regulations (CRS, April 17, 1980). Not all legislative veto provisions are still on the books.

[13] Federal Trade Commission Improvements Act of 1980, Pub. L. 96-252, sec. 21.

Serious consideration has been given to proposals which subject all proposed rules of all agencies to legislative review.[14]

Since such legislative negation of executive action is effected without presidential assent or involvement, and most often by only part of the legislative body (one-House, a committee, or even a committee chairman), substantial constitutional objections have been raised to this method of control. These are based primarily upon the separation of powers principle and the specific constitutional requirements that both Houses of Congress participate in the lawmaking process and that the President have an opportunity to veto the product of that process. There has as yet been no definitive judicial resolution of the issue.[15] The continuing uncertainty as to the veto's validity, combined with persistent Executive opposition to its application and doubts as to its practicality as a mechanism to manage and control administrative action on a broad scale, have raised serious questions as to its long range utility.[16]

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[14] See, *e.g.*, H.R. 512, H.R. 601, and H.R. 1776 (96th Cong., 1st Sess. 1979). In the 97th Congress see S. 382, S. 890, H.R. 1776, and H.R. 3740.

[15] Two cases have been decided on the merits. In *Atkins* v. *United States*, 556 F. 2d 1028 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978), a divided Court of Claims upheld the one-House veto provision of the Salary Act. In *Rai Chadha* v. *INS*, 634 F. 2d 408 (9th Cir. 1980), the appeals court struck down a one-House veto provision of the Immigration and Nationality Act on separation of powers grounds.

[16] See, *e.g.*, Bruff and Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 Harv. L. Rev. 1769 (1977); U.S. House of Representatives, Committee on Rules, Establishment of Procedures for Congressional Review of Agency Rules, Committee Print (96th Cong., 2nd Sess. 1980); McGowan, Congress, Court, and Control of Delegated Power, 77 Colum. L. Rev. 1119 (1977).

C. Presidential Efforts to Control Administrative Rulemaking Prior to 1981

The Executive's response, until the current Reagan Administration, has also been somewhat tentative. Past presidential attempts to control the structure and effects of federal regulation have relied on advisory interagency oversight mechanisms, the informal powers of the presidency, or a combination of the two.

During the Nixon Administration, the Office of Management and Budget (OMB) instituted a system of Quality of Life Review.[17] Although it was theoretically applicable to all agencies with jurisdiction over environmental quality, consumer protection, and occupational and public health and safety, review focused almost exclusively on Environmental Protection Agency (EPA) regulations.

Quality of Life procedures required all EPA regulations to be processed through an interagency review both before such regulations were issued as proposals for public comment and again before the regulations were promulgated in final form. OMB coordinated the review which involved the circulation of draft regulations to all interested departments and agencies and an allowance of time, often four weeks or more, for the preparation of comments, followed by meetings at the staff level to resolve any questions raised. OMB controlled the decision whether or not to require additional

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17/ The Quality of Life Review system has been the subject of considerable inquiry and scholarly comment. See generally, U.S. Senate, Committee on Environment and Public Works, Subcommittee on Environmental Pollution, "Hearings on Executive Branch Review of Environmental Regulations," 96th Cong., 1st Sess., at pp. 60-76 (1979) (Testimony of John Quarles); J. Quarles, Cleaning Up America: An Insiders View of the Environmental Protection Agency, pp. 117-142 (1976); Office of Management and Budget Plays Critical Part in Environmental Policymaking, Faces Little External Review, 7 Envir. Rep. (BNA) 693 (1976); Bruff, Presidential Power and Administrative Rulemaking, 88 Yale L.J. 451, 464-465 (1979) (hereinafter Bruff).

time for completion of agency review or to hold additional meetings to resolve disputes. The Department of Commerce was apparently a frequent and hostile participant, often reflecting indirectly the opposition to proposed EPA rules.[18/] If there was dissatisfaction with EPA's resolution of disputed issues, further meetings, presided over by OMB officials and often attended by White House staff, were called to resolve the conflicts.[19/] It is estimated that it took at least two years for significant environmental regulations to be finalized.[20/]

Quality of Life Review was highly controversial throughout its existence. Proponents contended that any delay in the rulemaking process was justified by the improved quality of both the regulations and the supporting analyses produced by the agency to justify its proposals. These improvements were directly attributed to the searching comments and critiques of sister agencies.[21/] Critics contended that the review unnecessarily extended the rulemaking process and allowed many important comments and discussions to occur off the public record, thereby depriving the system of the full benefits of public debate. Further, it was contended that the system in actuality often resulted in behind the scenes resolutions to accommodate objections of other agencies. This, assertedly, was contrary to the statutory assignment of ultimate decisionmaking authority in the Administrator of EPA and distorted the public perception of the locus of that final authority.[22/] Quality of Life

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[18/] Bruff, supra note 17, 88 Yale L.J. at 464.

[19/] Id., at 464-465.

[20/] Quarles testimony, supra note 17, at pp. 62-63.

[21/] Bruff, supra note 17, 88 Yale L.J. at 465.

[22/] Quarles Testimony, supra note 17, at pp. 63-66; 7 Envir. Rep. 693, 694, 695, 697.

Review was ended on January 25, 1977 by the Acting Administrator of EPA. There was no reported court challenge to the validity of the review system.

President Ford's Executive Order 11821[23/] required all agencies within the executive branch to prepare inflation impact statements when major new regulations were proposed, an effort to encourage the agencies to take account of economic matters outside their narrow statutory spheres. The impact statements prepared under this directive were reviewed by the President's Council on Wage and Price stability but that body had no power to mandate changes in the rules. There is some indication that the Order stimulated improvement in the economic analysis capability of some affected agencies and may have influenced some agency decisions.[24/]

President Carter's Executive Order 12044[25/] was somewhat wider in scope and substance. The Order attempted to ensure more meaningful public participation in informal rulemaking by setting a minimum 60-day comment period in certain cases. The Order also provided for review of "significant" proposed rules by the promulgating agency. Under certain circumstances agencies were required to analyze the anticipated impact of a proposed rule and to detail its consideration of the alternative approaches available. The agencies themselves determined whether a rule was significant and developed the procedures for preparing regulatory analyses. The agencies were also required to prepare semi-annual agendas of forthcoming rulemaking proceedings.

[23/] 3 C.F.R. sec. 203 (1974), extended to December 31, 1977 by E.O. 11949, 3 C.F.R. sec. 161 (1976), reprinted in 12 U.S.C. 1904 note (1976).

[24/] Note, The Inflation Impact Statement Program: An Assessment of the First Two Years, 26 Amer. U.L.Rev. 1138, 1160-1162 (1977); Federal Regulation: Roads to Reform, Commission on Law and Economy, American Bar Association (1979) p. 85 (hereinafter ABA Study).

[25/] 43 F.R. 12661 (1978), codified at 3 C.F.R. 152 (1979).

Oversight of the performance of the agencies was lodged in three institutional entities: the Regulatory Council, the Council on Wage and Price Stability (COWPS) and the Regulatory Analysis Review Group (RARG). The Regulatory Council, which consisted of the heads of all executive departments and agencies and those independent regulatory agency heads who desired to participate, had a two-fold role. It collected information from agencies about major pending and proposed rules and published it semi-annually in the Regulatory Calendar. It also served as a pre-screening body for proposed rules, allowing agencies to coordinate rulemaking to avoid duplication of effort or contradictions of policy. RARG, composed of representatives from all economic and regulatory agencies, chaired by the Chairman of the Council of Economic Advisors, and staffed by individuals from COWPS, had the task of selecting from 10 to 20 of the agencies' regulatory analyses for independent review and comment. The comments were to be filed during the public comment period of the rulemaking and made part of the record. But, as with the Ford Order, Executive Order 12044 vested no formal enforcement authority in any governmental body outside the subject agencies nor did it provide a central standard setting and performance evaluation mechanism by which to judge the efficacy of the regulatory analyses the agencies were required to perform. The Order depended entirely on hortatory means for achieving compliance, a task made most difficult by the presence of the subject agency on the interagency groups.[26]

Finally, it may be generally noted that, apart from creating systems of coordination and supervision, Presidents throughout history have attempted to exert directive or restraining influence on agency policymaking on an ad hoc basis through the use of the formal and informal powers of their office.[27] Thus the removal power of the President was used by President Jackson to ensure effectuation of his monetary policy by his Treasury Secretary and by President Nixon to forestall revelation of his taped secrets. Also, through OMB, the President has the power to control the budgetary and legislative requests of federal agencies to Congress[28] and to veto the information gathering exercises of many agencies, which is often critical to the regulatory process.[29] And, of course, the President may exert the enormous influence of his office to effect through persuasion a desired result in a particular policy formulation, although recent all too visible exercises of such informal suasion have raised a host of legal and political difficulties.[30]

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[26] For a critique of the Carter Order program see DeMuth, Constraining Regulatory Costs: Part I, The White House Programs, Regulation, January/February 1980, pp. 13-26; see also Interview, supra note 2, pp. 14-16.

Therefore, until now, presidential attempts to influence or control the rulemaking activities of administrative agencies have been either essentially hortatory interagency advisory and review systems lacking centralized control and enforcement authority or ad hoc intercessions into particular rulemakings by the President, or White House staff at his behest, utilizing whatever degree of authority of the presidential office seemed appropriate to the situation. President Reagan's February 17 Order contrasts dramatically with these previous presidential efforts in both its scope and substance.

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[27] The following examples are not meant to be an exhaustive catalogue of the powers of the office of the President vis-a-vis the administrative bureaucracy. See, for example, Corwin, The President: Office and Powers (4th ed. 1957); Verkuil, Jawboning Administrative Agencies: Ex Parte Contacts by the White House, 80 Colum. L. Rev. 943 (1980) (hereinafter Verkuil). Verkuil has a useful description of presidential intervention in three major and controversial rulemakings: cotton dust, ozone, and strip mining. See pp. 944-947.

[28] See generally, U.S. Senate Committee on Governmental Affairs, Study on Federal Regulation, Vol. V, Regulatory Organization, pp. 43-54, 95th Cong., 2d Sess. (1977); W. Cary, Politics and the Regulatory Agencies, pp. 6-8, 11-12 (1967); Dixon, The Independent Commissions and Political Responsibility, 27 Ad. L. Rev. 1, 6-8 (1975).

[29] 44 U.S.C. 3504, 3507, 3508.

[30] See DeMuth, *supra* note 26, at pp. 18-20 describing the problems engendered by presidential intercession in the OSHA cotton dust rulemaking; and *Sierra Club* v. *Costle*, No. 79-1565, D.C. Cir., April 29, 1981, slip opinion at pp. 212-220, concerning the proprietary of a briefing of the President and White House staff on issues and options of an EPA rulemaking on new source performance standards governing emission control by coal burning power plants after the close of the public comment period.

II. EXECUTIVE ORDER 12291: ITS PURPOSE, SCHEME, AND LEGAL JUSTIFICATION

A. Purpose and Scheme of the Order

The preamble to Executive Order 12291[31/] proclaims its purposes to be "to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations." To accomplish these goals the Order prescribes a number of general and specific requirements which Executive branch agencies[32/] must follow in exercising their statutory rulemaking powers. In addition, the Order vests separate but closely allied entities with authority to coordinate, supervise and enforce adherence to the Order's requirements subject to final appeal to the President.

More specifically, section 2 of the Order sets forth general requirements for all subject agencies when they engage in making new rules, reviewing old rules, and developing legislative proposals concerning regulation. Such agency actions may not be undertaken unless the potential benefits to society outweigh their potential costs to society; the objectives chosen maximize the net benefits to society; the regulatory alternative chosen involves the least net cost to society; and the priorities are set to maximize net societal

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[31/] 46 F.R. 13193 (February 17, 1981).

[32/] Independent regulatory agencies, as defined in the Paperwork Reduction Act of 1980, Pub. L. 96-511, 44 U.S.C. 3501, 3502 (10), are excluded from coverage. Executive Order 12291, section 1(d).

benefits by taking into account the particular affected industries, the condition of the national economy and other future regulatory initiatives. These requirements apply only to the extent permitted by law.

Section 3 requires that each agency prepare a Regulatory Impact Analysis (RIA) before issuing a major rule. A major rule is defined[33/] to include any rule likely to result in an annual effect on the economy of $100 million or more; or a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions, or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign bases enterprises in domestic or export markets. RIA's must accompany all notices of proposed rulemaking as well as all final rules. Preliminary RIA's must be submitted to the Director of the Office of Management and Budget (OMB) at least 60 days prior to the publication of a notice of proposed major rulemaking in the Federal Register. A final RIA must be submitted to the Director at least 30 days before the publication of the final major rule. If a major rule is not required to be published in proposed form, a final RIA must be prepared and submitted to the Director at least 60 days prior to its publication as a final rule.

Each RIA must describe the potential costs and benefits of the rule as well as identify those likely to receive the benefits and the costs. It must also describe the potential net benefits of the rule, including effects that cannot be quantified.

33/ *Id.*, sec. 1(b).

Agencies are also required to initiate reviews of currently effective major rules, utilizing the Orders' standards and following its requirements, including the preparation of RIA's.

The Order also requires that each agency, before promulgating a final major rule, determine that the regulation is within the authority designated by law and consistent with Congressional intent, and publish in the Federal Register a memorandum of law supporting that determination. Agencies are also required to determine that the factual conclusions upon which the rule is based have "substantial support" in the rulemaking record.[34/]

The Director of OMB, subject to the Presidential Task Force on Regulatory Relief (Task Force), is vested with the authority to coordinate and implement the Order.[35/] Presently, the Office of Information and Regulatory Affairs, headed by James C. Miller III as Administrator, exercises OMB's authority. The Task Force, which is chaired by Vice President Bush, includes as members the Director of OMB, the Secretaries of Treasury, Commerce, and Labor, the Attorney General, the Chairman of the Council of Economic Advisors, and the Assistant to the President for Policy Development. Mr. Miller is Executive Director of the Task Force. OMB also supplies most of the Task Force personnel. The overlap raises some question whether in fact two distinct entities will actually evolve. Technically under the Order OMB operational decisions are subject to appeal to the Task Force, and ultimately, to the President.[36/]

34/ Id., sec. 4.

35/ Id., sec. 6.

36/ Id., sec. 3(e)(1).

The Director is vested with primary operational authority over the definition, coordination, implementation, and enforcement of the provisions of the Order. The Director is given authority to prescribe criteria for determining which are major rules;[37] order that a proposed or existing rule or a set of related rules be treated as major rules;[38] order an agency not to publish a notice of proposed rulemaking or preliminary RIA until his review is completed;[39] order an agency not to publish a final rule or RIA until the agency has responded to his views regarding the rule or RIA;[40] issue uniform standards for the development of RIA's;[41] require an agency to obtain and evaluate additional data relevant to a regulation from any appropriate source;[42] require interagency consultation to minimize or eliminate rules identified as duplicative, overlapping or conflicting;[43] waive all RIA and other requirements for proposed or existing major rules;[44] and to require agencies to review currently effective rules and prepare RIA's for major rules in accordance with schedules established by the Director.[45]

Executive Order 12291 sets up a framework for management of the administrative rulemaking process that is undeniably unprecedented in scope and substance. It establishes conception-to-grave oversight authority over the rulemaking capabilities of all covered agencies. Effective operational authority is concentrated in the hands of one government official, the Director of OMB. He is the President's closest management agent, and an official whose agency is already endowed with substantial influence over agency policymaking through its control of the budget and legislative clearance process and the information gathering activities of the agencies. The authority vested in the Director extends to defining what a major rule is and then designating which proposed or existing rules fall within the ambit of the definition. Designation of a rule as major triggers procedural requirements, including the preparation of cost-benefit impact analyses whose content is also subject to the definition by the Director.[46/] The Director may require agencies to consult with him about any preliminary RIA and notice of proposed rulemaking, and upon receiving notice that the Director intends to submit views concerning any final RIA or final rule, the agency must refrain from publishing these documents until the agency has responded to the Director's views and incorporated those views and the agency's response in the rulemaking file. The Director may order an agency to conduct a review of its existing rules to determine if any are major and require RIA's on those that are major according to a time schedule fixed by him. On the other hand, the Director is empowered to waive all requirements of the Order with regard to a rulemaking without limitation or standard. Without more then, the Order allows the Director wide latitude in determining at least the timing and volume of all covered agency rulemaking.

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[37] Id., sec. 3(b).

[38] Id., sec. 6(b)(1), 3(b).

[39] Id., sec. 3(f)(1).

[40] Id., sec. 3(b)(2).

[41] Id., sec. 6(a)(2).

[42] Id., sec. 6(a)(3).

[43] Id., sec. 6(a)(5).

[44] Id., sec. 6(a)(4), 8(b).

[45] Id., sec. 3(i).

[46/] The requirement of RIA's of section 3 of the Order should be read in conjunction with section 2(b)'s overall injunction that "regulatory action shall not be undertaken" unless potential benefits outweigh potential costs.

OMB's authority is not unrestrained. Appeals from the Director's decisions may be taken to the Task Force and from there to the President for final resolution. The Director may not require any action that displaces an agency's responsibility under law or conflicts with any procedural requirements of the Administrative Procedure Act or other applicable statute. The Director must abide by the procedural requirements of the Order if his comments on rules and RIA's are to be considered by an agency and OMB's negative comments on rules and RIA's[47] and the agency's response must be included in the rulemaking file. Further, the Order does not give OMB direct authority over the substance of agency rules nor can it prevent an agency from ever publishing a proposed or final rule.

Executive Order 12291 thus departs from prior presidential efforts to control agency rulemaking in several significant respects: First, it concentrates authority in one agency rather than in an interagency group. Second, a formalized system is established with defined procedures and an allocation of specified duties and responsibilities which was lacking in prior efforts. Third, the coordinating agency is invested with the authority to define and implement a uniform methodology and system of standards by which key regulatory action is to be judged. Finally, the supervisory agency has the power to command obedience to the Order's requirements.

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[47] Executive Order 12291, sec. 3(b)(2). Other OMB contributions to the rule development process are not required to be placed in the rulemaking record nor apparently will they be. See, Interview, supra note 2, p. 18 (Remarks of Jerome Weidenbaum).

B. The Legal Basis for the Order: The Department of Justice Memorandum of February 13, 1981

The President cites no specific constitutional provision or statute to support Executive Order 12291. Rather, he refers generally to "the authority vested in me as President by the Constitution and laws of the United States of America." The official Administration legal rationale appears to rest upon an analysis by the Department of Justice's Office of Legal Counsel[48] released simultaneously with the Order. The memorandum concludes that the Order is "acceptable as to form and legality" relying almost exclusively on the President's constitutional duty to "take care that the laws be faithfully executed"[49] and the interpretation given that clause by Chief Justice Taft in Myers v. United States,[50] and on a reading of the Order to the effect that none of its procedural or substantive requirements would wholly displace a discretionary function placed in a subordinate executive officer by the Congress. The memorandum cites no statutory authority directly supporting the President's action.

More specifically, the Justice Department memorandum reasons as follows. It first sets forth the general constitutional principles perceived as underlying presidential authority. The "take Care" clause, as construed in Myers, is asserted to authorize the President, as head of the Executive Branch, to

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[48] Memorandum of Acting Assistant Attorney General Larry L. Simms, Proposed Executive Order Entitles "Federal Regulation", February 13, 1981. (Simms Memo) The pertinent portion of the memorandum is set forth as Appendix B.

[49] U.S. Constitution, Art. II, sec. 3.

[50] 272 U.S. 52 (1926).

"supervise and guide" executive officers in carrying out the statutes under which they act so that there can be some measure of uniformity in the interpretation and execution of diverse laws enacted by Congress. A denial of such guidance from the sole officer vested with the executive power under the Constitution could result in confusion and inconsistency amongst government agencies. On the other hand it is conceded that Congress may so delimit a delegation of authority to a subordinate official as to preclude presidential supervision of decisionmaking. Such cases are rare, it is argued, and it must be presumed that when Congress delegates rulemaking authority to the heads of non-independent agencies, it is aware that they are removable at the will of the President and that it would be anomalous to believe that Congress would make such delegations with a lack of understanding of the existence of that control relationship. From these premises it is concluded that the standard to be applied for determining the permissible extent of presidential guidance and supervision is to be based on the degree of displacement of subordinate officer discretion. "[S]upervision is more readily justified when it does not purport wholly to displace, but only to guide and limit, discretion which Congress has allocated to a particular subordinate official. A wholesale displacement might be held inconsistent with the statute vesting authority in the relevant official." 51/

Turning to the specifics of the Order, the memorandum notes that while it imposes both procedural and substantive requirements, none reach an unlawful degree of displacement. The requirement of preparation of an RIA is identified as a procedural requirement "which like most procedural requirements is at most

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51/ Simms Memo, p. 4.

an indirect constraint on the exercise of statutory discretion."[52] It is deemed lawful because it is designed to promote, in the words of Myers, the "unitary and uniform execution of the laws" and also to aid the President in carrying out his constitutional duty to propose legislation.[53]

The requirement that agencies exercise their discretion in accordance with the principles of cost-benefit analysis[54] is identified as substantive in nature. But since the Order recognizes an exception to adherence to its requirements when precluded by law, it would not conflict with statutes that explicitly preclude decisions based on cost-benefit assessments. Where a statute is silent, however, an agency decisionmaker is free to consider such factors and the President is within his supervisory authority to see that the decisionmaker considers it. As it is the agency head, and not the President, that makes the calculation under the Order, that officer retains considerable latitude in determining whether regulatory action should be taken.[55]

The memorandum finds that the function of OMB and the Task Force is supervisory in nature. Such tasks as the development and implementation of uniform systems of methodology, placing statements of disapproval in the agency's rulemaking record, and deferring rulemaking to allow agency response to OMB objections, among others, do not suggest authority to reject an agency's ultimate judgment. The memorandum concludes that the Order

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[52] Id., at p. 5.

[53] Id.

[54] "Regulatory action shall not be undertaken unless potential benefits to society for the regulation outweigh the potential costs to society." Executive Order 12291, section 2(b).

[55] Simms Memo, p. 6.

"is consistent with the President's recognized powers to supervise the Executive Branch without displacing functions placed by law in particular agencies."[56]

C. Comments on the Justice Department Memorandum

The Justice Department analysis appears somewhat incomplete or to rest on assumptions that are unarticulated or perhaps both. In any event, issues that seem legitimately cognizable are neither treated or defined. This is not to say that if raised, the ultimate conclusion of the Justice Department would have been, or even should have been, altered. Rather, a legal assessment commensurate with the apparent gravity of the fundamental constitutional issues that could be raised might be beneficial.

For example, the memorandum treats two specific requirements of the Order and the general supervisory functions devolved on OMB and the Task Force as isolated aspects of the discretion displacement issue, divorcing them from each other as well as from their context in the Order. The Order, however, is a complex, interrelated series of prescriptions and functions that, taken as a whole, establishes an integrated system of management of a substantial portion of the rulemaking activities of the Executive Branch. Thus the requirement that an agency prepare an RIA assessing costs and benefits of major rules standing alone may be properly characterized as procedural and is relatively innocuous legally until it is seen as part of mandatory assessment process, conceded to be substantive in nature, which requires the utilization of "the principles of cost-benefit analysis".[57] Even then the conclusion that sufficient discretion is left with subordinate executive officials is plausible since it may be conceded that there is no single set of cost-benefit principles applicable to all situations.[58] But these two requirements do not stand alone. The rulemaking authority vested in the Director of OMB allows him to "prepare and promulgate uniform standards for... the development of Regulatory Impact Analyses".[59] Thus whether such standards are government-wide or individually tailored to an agency, agency head discretion is diminished in a degree not accounted for in the memorandum's conclusion that "[t]he agency would thus retain considerable latitude in determining whether regulatory action is justified and what form such action should take,"[60] since "the principles of cost-benefit analysis" may be selected for him requiring little more than simply ministerial application. Finally, section 2(b) of the Order appears to enjoin all subject agencies to take no "[r]egulatory action ... unless the potential benefits to society for the regulation outweigh the potential costs to society." Initial implementation of this directive of course falls to the Director. In the face of this directive, will the Director, after developing cost-benefit principles, fail to attempt to ensure their proper application to the fullest extent of his authority?

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[56] Id. at p. 7.

[57] Simms Memo, p. 5.

If the foregoing provisions are taken together, in the context of the stated goals of the Order, and viewed in light of reasonably foreseeable consequences of the exercise of the Order's formal enforcement mechanisms,[61] a significantly different, and perhaps more accurate, situation is presented for legal analysis, one that may raise more fundamental legal issues. For instance, it appears to be an unstated assumption that the new procedural requirements of the Order are no more than an enhancement of the informal rulemaking process of the Administrative Procedure Act[62] (APA) under which agencies must adhere to certain procedural minima but may tailor additional procedures to suit the necessities of a particular rulemaking.[63]

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[58] See, e.g., U.S. House of Representatives, Committee on Interstate and Foreign Commerce, Subcommittee on Oversight and Investigation, Cost-Benefit Analysis: Wonder Tool or Mirage? Committee Print, 96th Cong., 2d Sess. (1980).

[59] Executive Order 12291, sec. 6(a)(2).

[60] Simms Memo, p. 6.

Viewed from the perspective of the totality of the Order's provisions and their intended purposes, it may be argued that the Order effects a substantive revision of section 553 by, among other things, formally extending the process to include the rule formulation period and imposing on the entire reconstituted process procedural requirements of a substantive nature. Indeed, the explicit thrust of the Order is to alter the substantive character and impact of proposed and existing rules.[64] Until now section 553 has had a conspicuously non-substantive orientation. The spare procedures of section 553 were designed, in the words of the Supreme Court, to take advantage of the "inherent advantages of informal rulemaking": expedition, flexibility to agency education through public participation, and freedom to utilize agency expertise.[65] There is a particular focus in that provision on individual agency action that appears to have been a conscious legislative intent. If so, a question may be raised as to source of presidential authority to accomplish what then may effectively be a substantive amendment of the APA. By the same token, if the Director may prescribe specific standards for cost-benefit analysis of all proposed or existing major rules, determine which rules are major, and enforce their application at the very least by indefinite deferrals of agency action, the same question of Executive legislation is raised with respect to the myriad of statutes which vest discretionary rulemaking authority in agency officers without indication whether or not a weighing of costs and benefits should be part of the decisionmaking process.

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[61] The potential impact of the additional authority of the Director on such matters as budget requests and legislative proposal clearance, see 31 U.S.C. 2, 16, 18, and 23, and its enhanced control of agency information gathering authority as a result of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq., which may be independently exercised over these same agencies might also be factored in.

[62] 5 U.S.C. 553 (1976).

[63] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 543-544 (1978).

[64] The preamble and section 2, and particularly section 2(b), make this abundantly clear.

A further issue that may be implicated by the pervasive scope of the Order involves its potential conflict with judicial and Congressional safeguards that have been established to extend fairness protections normally associated with adjudication to rulemaking and other informal executive actions to guard against inappropriate influences in agency policymaking.[66] Since the Order formally introduces the President and his personal agents into the earliest stages of the rule formulation process, the contacts not only between OMB staff and subject agencies but also between White House staff and those agencies can be anticipated to be greatly increased. Moreover, the temptation of non-governmental interests to resort to informal contacts at this new point of access to the process will be substantial.[67] The Order, however makes no specific provision for the control of ex parte contacts. In fact, the Order requires that only negative OMB comments be placed in the rulemaking record and the indication is that no other aspects of the pre-proposal decisional period will be voluntarily revealed.[68] Whether and under what circumstances ex parte contacts in the new process may impair the goals of fairness to interested persons, reasoned agency decisionmaking based on some kind of record, and ease of judicial review could well become a matter of legal moment as a consequence of the scope and potential impact of the Order. The question seems deserving of being directly addressed.

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[65] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 547 (1978); see also, Pacific Coast European Conference v. United States, 350 F. 2d 197, 205 (9th Cir. 1965), cert. denied 382 U.S. 958 (1965).

[66] See, Sangamon Valley Television Corp. v. United States, 269 F. 2d 221 (D.C. Cir. 1959); D.C. Federation of Civic Associations v. Volpe, 459 F. 2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972); Home Box Office, Inc. v. FCC, 567 F. 2d 9 (D.C. Cir.) cert. denied, 434 U.S. 829 (1977); Action for Childrens' Television v. FCC, 564 F. 2d 458 (D.C. Cir. 1977); United States Lines, Inc. v. FMC, 584 F. 2d 519 (D.C. Cir. 1978); Hercules, Inc. v. EPA, 598 F. 2d 91 (D.C. Cir. 1978); Government in the Sunshine Act, Pub. L. 94-409, 5 U.S.C. 552b (1976).

The issue raised by Executive Order 12291 concerns no less than the nature and scope of presidential power. The Justice Department memorandum appears to recognize this by its invocation of the "take Care" clause but diminishes the substantiality of the constitutional issue by trivializing the scope and potential impact of the Order. Thus, whether by design or otherwise, legal analysis of Executive power under the Constitution is confined to references to the dicta of Myers and the dissent in the Steel Seizure Case[69] and the development of a far reaching theory of incremental presidential displacement of subordinate official discretion, without acknowledgement or assessment of Supreme Court decisions, for example, that have apparently substantially modified Myers[70] and others that have insulated discretion committed to subordinate executive officers from higher control or interference.[71]

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[67] That process apparently began almost immediately upon issuance of the Order. See "Lawyers Search for Keys to New Regulatory Power Center", Legal Times, February 23, 1981, p. 1. On the implications of such "conduit" contacts, see Verkuil, supra note 27, at p. 981.

[68] Interview, supra note 2, p. 18.

What is required in the circumstances is a full articulation of a theory of presidential power in this area based upon constitutional precedent and practice, which when applied to the facts at hand will lend support to the President's action. Only then can the President's position be fairly assessed. The next section of this report will attempt to construct such a position.

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[69] Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952).

[70] Humphrey's Executor v. United States, 295 U.S. 602 (1934); Wiener v. United States, 357 U.S. 349 (1958).

[71] See, e.g., United States v. Nixon, 418 U.S. 683 695-696 (1974); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 266-267 (1954).

III. THE CASE IN SUPPORT OF THE PRESIDENT'S EXERCISE OF AUTHORITY TO COORDINATE, SUPERVISE, AND GUIDE THE RULEMAKING PROCESS OF EXECUTIVE BRANCH AGENCIES

Presidential authority to manage administrative rulemaking derives from the Article II provision vesting all executive power in the President, and the powers and duties prescribed or implicit in that Article enabling the Chief Executive to fulfill his constitutionally mandated role as head of the Executive Branch. That authority is buttressed by judicial interpretations which recognize the constitutional necessity for an effective central manager, as well as substantial Congressional support for and acquiescence in that view. Executive Order 12291 does no more than rationalize management direction over the Executive Branch decisionmaking process. Since it in no way interferes with the decisional role assigned by Congress to subordinate executive officers, and meaningful judicial review of the process remains available, the oversight system established by the Order is legally unassailable.

A. Article II Provides Ample Authority for the Exercise of Presidential Power in the Area of Managerial Supervision of Subordinate Executive Officers

Article II of the Constitution provides the legal basis for presidential oversight and management of the rulemaking process. Section 1 reposes all executive power in a single chief executive: "The executive Power shall be vested in a President of the United States of America." The President is then charged with the responsibility to "take Care that the Laws be faithfully executed"[72/] and to aid him in this task he "may require the opinion, in

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[72/] Art. II, sec. 3.

writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices."[73] He can "nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors ... and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone ... ."[74] The President is required "from time to time give to the Congress information of the State of the Union and recommend their consideration such measures as he shall judge necessary and expedient."[75] In addition, he is designated the Commander-in-Chief of the nation's armed forces.[76]

On its face, Article II sets out a potentially formidable scheme for executive control of administration. By vesting the entire "executive Power" in the one federal officer with a national constituency, the twin notions of accountability and efficiency are accommodated. These are reinforced strongly by the sparse but important provisions that follow. The constitutional scheme develops clear and rational lines of authority that reflects the competing claims of administrative necessity and the separation of powers. The President can appoint the executive officers and require them to report to him so he can determine whether the laws are being "faithfully executed." The ability to require reports also necessarily implies the right to confer and discuss with those officers. The President in turn must periodically report to the

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[73] Art. II, sec. 2.

[74] Art. II, sec. 2, cl. 2.

[75] Art. II, sec. 3.

[76] Art. II, sec. 2.

Congress as to progress of the administrative operation and suggest further legislative action. At the very minimum, then, the scheme implies operational oversight and management of the administrative process if not some degree of substantive control itself. It also suggests the conscious creation of a line of authority that runs directly from Congress to the President and not from Congress to subordinate executive officers.

Judicial affirmation of the wide scope of the supervisory authority vested in the President by Article II appears in the Supreme Court's decision in Myers v. United States.[77] That case involved the authority of the President to remove an executive officer (a first-class postmaster) appointed by him with the advice and consent of the Senate, in the face of a statutory provision requiring Senate acquiescence in the removal. In an opinion for a 6-3 majority of the Court, Chief Justice Taft ruled that the restrictive provision of the statute was unconstitutional. The opinion expounded a broad view of executive power. Relying on the "take Care" clause of Article II and its provision that "The executive Power shall be vested in a President," the Chief Justice reasoned that the President had the exclusive power and responsibility to execute the law; that to execute the laws he must have agents; and that to fulfill his responsibility those agents must be subject to him.

> The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates.... As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, ... that as his selection of administrative

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[77] 272 U.S. 52 (1926).

> officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible. [78]

The President, he concluded, as head of the Executive Branch, must have the authority to "supervise and guide" subordinate executive officers in "their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone."[79]

The vitality of Taft's conception of the President's singular managerial role as coordinator and supervisor of the execution of the laws derived from the "take Care" clause has not been diminished by any subsequent court decision. The Court's rulings in Humphrey's Executor v. United States[80] and Wiener v. United States,[81] invalidating presidential removals of officers of independent commissions, may be seen as confirmation of Taft's own recognition that in some instances "there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether a President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals where decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control."[82] In both

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[78] Id. at 117 (citation omitted).

[79] Id. at 135.

[80] 295 U.S. 602 (1935).

[81] 357 U.S. 349 (1958).

[82] 272 U.S. at 135.

Humphreys and Wiener the Court relied heavily on the clear manifestation of the intent of Congress to insulate the officers of the agencies in question from executive control and on the quasi-judicial character of the functions those officers were called upon to perform.[83]

Similarly, in the Steel Seizure Case,[84] the rejection of a claim of inherent authority in the President to seize private property in an emergency based upon the general constitutional grant of executive power must be read in the light of the fact that the case arose in the context of a specific Congressional denial of presidential power to act. Indeed, a majority of the Justices did not foreclose the possibility that absent such a clear prohibition, the authority to act under the general Article II powers could be implied under proper circumstances. Thus, Chief Justice Vinson's observation as to the unique constitutional role of the President as coordinator of the execution of the myriad of laws remains appropriate in the proper context: "unlike an administrative commission confined to the enforcement of the statute under which it was created, or the head of a department when administering a particular statute, the President is a constitutional officer charged with taking care that a 'mass of legislation' be executed. Flexibility as to the mode of execution is a matter of practical necessity."[85]

Finally, in United States v. Nixon,[86] the Court recognized a constitutionally based privilege of confidentiality of conversations between the

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[83] See 295 U.S. at 624-626, 629; 357 U.S. at 355-356.

[84] Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[85] 343 U.S. at 702.

[86] 418 U.S. 683 (1974).

President and his staff, reasoning that they "must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way would be unwilling to express except privately .... The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."[87/] The privilege applies equally when presidential staff and advisors seek to confer in private with cabinet officers and administrators of executive agencies, for they also need "to explore alternatives" in setting policy. The ability to function effectively protected by the separation of powers extends to the entire Executive Branch. As the Nixon court observed, "[H]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."[88/]

The executive privilege relating to the control of administrative officials is not unbridled. It is, of course, strongest when the President acts directly. But it does not totally yield because of the absence of direct presidential involvement. The President must act through subordinates to accomplish the business of administration. One restraint on the possibility of secret policymaking by presidential advisors inheres in the separation of powers and is reflected in the established practice of cabinet members going before Congress to respond to inquiries as to their activities.[89/] A second restraint resides in the limited nature of the privilege. The Court emphasized that the privilege

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[87/] Id. at 708.

[88/] Id. at 705.

[89/] The Director of OMB is subject to Senate confirmation and is a cabinet level advisor.

is limited by countervailing constitutional interests, such as due process.[90] This due process limitation would come into play if the President or a subordinate acting under his direction seeks to go beyond the coordination of policy to control the ultimate exercise of discretion by means of secret communications or undue influence. The *Nixon* case thus reaffirms the Court's recognition of the unique, constitutionally founded position of the President in the administrative process.

This reading of Article II authority was most recently adopted in *Sierra Club* v. *Costle*[91] in the relevant context of a contested informal rulemaking proceeding. There the validity of the rulemaking was challenged on the ground, *inter alia*, of improper presidential intercession after the close of the public comment period. In rejecting the contention, the Court of Appeals for the District of Columbia emphatically adopted the broadest view of executive power:

> The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. He and his White House advisers surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared--it rests exclusively with the President. The idea of a "plural executive," or a President with a council of state, was considered and rejected by the Constitutional Convention. Instead, the Founders chose to risk the potential for tyranny inherent in placing power in one person, in order to gain the advantages of accountability fixed on a single source. To ensure the President's control and supervision over the Executive Branch, the Constitution--and its judicial gloss--vests him with the powers of appointment and removal, the power to demand written opinions from executive officers, and the right to invoke executive privilege to protect

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[90] 418 U.S. at 709. See, Note, Due Process and Ex Parte Contacts in Informal Rulemaking, 89 Yale L.J. 194 (1979).

[91] No. 79-1565, D.C. Cir., April 29, 1981. For further discussion of the implications of the ruling, see *infra* notes 114-115 and accompanying text.

> consultative privacy. In the particular case of EPA, Presidential authority is clear since it has never been considered an "independent agency," but always part of the Executive Branch.
>
> The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking. Regulations such as those involved here demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national economic policy. Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as the White House. 92/

Court interpretations of the Article II authority therefore confirm that the President is to coordinate, supervise, and guide the policymaking activities of subordinate officers in order to achieve the twin goals of accountability to the electorate and efficiency of government operations. The removal cases and United States v. Nixon underline the necessity for presidential consultation. It would be incongruous to conceive that the exercise by the President of the ultimate power of removal from office would not be the end product of an unsuccessful consultative process. Those cases, together with the Steel Seizure Case, also make it clear that Congress may insulate decisionmaking from presidential control but that the intent to do so must be plain and unmistakable.

B. Congress Has Acquiesced in the President's Central Management Role

Congressional practice makes it evident that it is well aware of its authority to effectively intervene in the administrative decisonmaking process.

92/ Id., slip opinion at 214-217.

The legislative practice is sufficiently sophisticated, varying in its degrees of control, or lack of it, from situation to situation, that is is possible to conclude that where Congress has not specified the precise manner and means by which discretion is to be exercised, presidential guidance and supervision is permissible as long as the ultimate decision remains with the subordinate officer vested with the discretion.

The pivotal modern legislative development with regard to centralization of administrative control in the Executive is the Budget and Accounting Act of 1921.[93] Previously the Congress had maintained substantial control over agency activities, including policymaking, by dealing individually and directly with many Executive Branch departments and agencies with regard to their annual budget requests. The cost and unwieldy, inefficient nature of the process impelled Congress to yield to the President power to present an annual unified budget for executive agencies.[94] Congress subsequently extended that power over independent regulatory agencies[95] and enhanced the authority of the Bureau of the Budget (now OMB) by requiring all subject agencies to submit budget requests and legislative proposals, or responses to congressional requests for comments on proposed legislation, to it for clearance.[96] Since 1942, OMB has maintained control over the information gathering requests of agencies.[97]

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[93] Pub. L. 67-13, 42 Stat. 20 (1921), codified throughout Title 31 of the United States Code. The Office of Management and Budget was created by Reorganization Plan No. 2 of 1970.

[94] See generally, Fisher, Presidential Spending Power (1975), Chap. 1.

[95] 31 U.S.C. 2 (1976).

[96] See 31 U.S.C. 16, 23 (1976). The requirement of legislative clearance does not appear to be legislatively based but has been an accepted practice since 1937. See Bureau of Budget Circular No. 344, dated November 15, 1937.

[97] Federal Reports Act, Act of December 24, 1942, 56 Stat. 1078, 44 U.S.C. 3501 *et seq*.

Until 1973, this clearance authority extended to independent regulatory agencies when it was withdrawn.[98/] Congress has since returned partial control over the independents to OMB.[99/]

Congress may, and has, expanded and contracted OMB's authority in these areas.[100/] One significance of these legislative actions is that "[b]y this ebb and flow of control over agency budgets, Congress demonstrates willingness both to accede to and check presidential control over administrative policymaking."[101/] Another is that Congress has consciously effected a shift of considerable practical control over administrative policymaking to the Executive.

Legislative action with respect to administrative procedure is also indicative of Congress' attitude respecting the scope of control it means to allow the Executive over policymaking. The Administrative Procedure Act (APA)[102/] places no impediments on presidential participation in the informal rulemaking

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[98/] Pub. L. 93-153, 87 Stat. 9593 (1973), 44 U.S.C. 3512 (1976).

[99/] Paperwork Reduction Act of 1980, Pub. L. 96-511, 44 U.S.C. 3501 et seq. OMB may now veto collection requests by independent regulatory commissions but the veto may be overridden by a majority vote of the subject commission. See 44 U.S.C. 3507(c).

[100/] See notes 97 and 98 supra. Congress has also mandated that the budget requests of the U.S. Postal Service, Pub. L. 93-328, sec. 3, and the U.S. Internation Trade Commission, Pub. L. 93-618, sec. 175(a)(1), be submitted to Congress without revision, and that the budget requests and legislative proposals of other agencies be submitted concurrently to OMB. See, e.g., Consumer Product Safety Commission, 15 U.S.C. 2076(k)(1)(2); Commodity Future Trading Commission, Pub. L. 463, sec. 101; Privacy Protection Study Commission, Pub. L. 93-579, sec. 5(a)(5); National Transportation Safety Board, Pub. L. 93-633, sec. 304(b)(7). Section III of Pub. L. 93-495, exempts the following agencies from clearance of legislative proposals and comments: Securities and Exchange Commission, Board of Governors of the Federal Reserve System, Federal Report Insurance Corporation, Federal Home Loan Bank Board, and the National Credit Union Administration.

[101/] Verkuil, supra note 27, at pp. 963-964.

[102/] 5 U.S.C. 551 et seq. (1976).

process of section 553, which is the sole focus of the Order.[103] The spare procedures of that process require only publication of a notice of proposed rulemaking, an opportunity for written comment by interested persons, publication of final rule together with a statement of basis and purpose, and delayed effectiveness of at least 30 days. No formal hearing is required to be held and the rulemaking record consists of the statement of the basis and purpose, the public comments submitted, and what other matter the agency chooses to place in it. But the promulgating agency is not bound by the public record and may ignore it completely.[104] Judicial review is governed by the "arbitrary and capricious" standard which accords an agency considerably leeway; it normally simply has to demonstrate a rational relationship between the rule and the statutory authority under which it is promulgated.[105] Of course, agencies are free to add more formal procedures to their rulemaking proceeding.[106] But so is Congress. It can, for example, impede Executive control over the just described process by requiring rulemaking to be made entirely on the record; or it can require revelation on the record of all ex parte contacts during an informal rulemaking. Congress has not chosen to take these steps.

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[103] Executive Order 12291, sec. 1(a)(1).

[104] See, Nathanson, Probing the Mind of the Administration: Hearing Variations and Standards of Judicial Review Under the APA and Other Federal Statutes, 75 Colum. L. Rev. 721, 754-755 (1975).

[105] See, Verkuil, Judicial Review of Informal Rulemaking, 60 Va. L. Rev. 185, 212-214 (1974); Note Judicial Review of Facts in Rulemaking: A Proposed Standard, 84 Yale L.J. 1750 (1975).

[106] Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

In 1976 Congress passed the Government in the Sunshine Act[107] which requires collegial bodies[108] to hold open business meetings so as to insure public scrutiny. The Act also amended the APA explicitly to prohibit ex parte comments in formal rulemaking.[109] Thus the Congress did not apply the Act to either the executive agencies or to the informal rulemaking process.

On the other hand Congress can, and has, on a selective basis, accompanied new delegations of rulemaking authority with special procedures supplementing those found in the APA. These range from requiring publication of advanced notices of proposed rulemaking,[110] to the addition of procedural requirements that "hybridizes" the rulemaking process,[111] to subjection of the process to more stringent judicial review based on a statutory definition of the record for review.[112] These piecemeal alterations demonstrate an evident dissatisfaction with notice and comment rulemaking and are aimed at improving agency accountability and assuring the promulgation of rules that are rational and legally justifiable.[113]

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[107] Pub. L. 94-409, 90 Stat. 1241 (1976), 5 U.S.C. 552b (1976).

[108] Agencies comprised of two or more individual members. 5 U.S.C. 552b(a)(1) (1976).

[109] 5 U.S.C. 557(d)(1) (1976). The prohibition applies to any "interested person outside the agency".

[110] *E.g.*, Consumer Product Safety Act of 1972, 15 U.S.C. 2056(b) (1976). On hybrid rulemaking see Williams, "Hybrid Rulemaking" Under the APA: A Legal and Empirical Analysis, 42 U. of Chi. L. Rev. 401 (1975).

[111] *E.g.*, Federal Trade Commission Improvements Act of 1975, 15 U.S.C. 57a (1976).

[112] *Id.*

[113] See Bruff, *supra* note 17, pp. 489-491; Verkuil, *supra* note 27, pp. 968-970.

These trends in procedural legislation have a number of important implications. The failure to amend section 553 to impose more formal rulemaking procedures on a general basis, or to apply open meeting requirements to executive agencies, or to subject informal rulemaking to ex parte prohibitions, suggests a Congressional recognition that the Executive, of necessity, plays a political role in formulating agency policy through informal rulemaking. The D.C. Circuit's recent decision in Sierra Club v. Costle[114] lends judicial credence to this observation. There it was argued that a post-comment period meeting between the President, White House staff, and agency officials responsible for the final decision in a heatedly contested informal rulemaking, which was not docketed, violated the Clean Air Act and precepts of due process and thereby voided the proceeding. The Court rejected the argument, commenting:

> ... Of course, it is always possible that undisclosed Presidential prodding may direct an outcome that *is* factually based on the record, but different from the outcome that would have obtained in the absence of Presidential involvement. In such a case, it would be true that the political process did affect the outcome in a way the courts could not police. But we do not believe that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political consideration or the presence of Presidential power. [115]

It may be further argued that under this view of the nature of informal rulemaking, continued Congressional acceptance of administrative lawmaking under notice and comment procedures, or new delegations which are to be exercised pursuant to section 553, perforce acquiesce in the possibility if not the fact of presidential intervention in the process.

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[114] No. 79-1565, D.C. Cir., April 29, 1981.

[115] Id., slip opinion, at p. 220 (emphasis in original). See also, Westinghouse Electric Corp. v. United States, 598 F. 2d 759, 774-776 (3rd Cir. 1979) (Nuclear Regulatory Commission need not ignore President's public policy pronouncements).

Moreover, this judicial recognition of Congressional acquiescence in the Executive role in informal rulemaking takes on added significance in light of the Supreme Court's decision in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.[116] There the Court brought to a halt a trend of lower court decisions which sought to influence the process of regulatory policymaking by judicially imposing procedural requirements on informal rulemaking beyond those required by the APA.[117] The Court held that the lower federal courts have no authority to order agencies to engage in rulemaking procedures beyond those specified in the APA or other relevant statute. Beyond the procedural minima established by section 553, the agencies are free to employ more elaborate procedures as suits their needs.[118]

The Vermont Yankee decision is important in the instant situation. With the Court's withdrawal of judicial oversight of procedures which affect the agency decisionmaking process, and the Congressional reluctance to alter the minimal generic procedural requirements of rulemaking, an effective supervisory void is created. Plainly, this void was not meant to be prohibitory on the Executive. The judicial view of the key constitutional role of the President in administrative management in fact invites a presidential initiative in the area. Since neither the Constitution nor the APA preclude it, an executive order prescribing prospective procedural requirements on agencies is wholly appropriate and legal in the circumstances.

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[116] 435 U.S. 519 (1978).

[117] See, e.g., Portland Cement Association v. Ruckleshaus, 486 F. 2d 375 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974); Home Box Office, Inc. v. Federal Communications Commission, 567 F. 2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

[118] 435 U.S. at 545-546.

Other indications of legislative recognition of the President's central management role which support the purposes of the Order may be briefly noted. The Budget and Impoundment Act of 1974,[119] while reasserting Congressional spending power, left the President with important initiative authority that can have the effect of at least temporarily interrupting the flow of funding. Thus a proposal to rescind budget authority for a program will effectively stop agency spending for at least 45 days.[120] The Act affords the President even greater power in its deferral provisions.[121] Subject to a one-House legislative veto,[122] the President is authorized to affect levels of progam implementation and enforcement by deferring the expenditure of appropriated funds for the remainder of the fiscal year.

The consistent legislative renewal of presidential reorganization authority[123] is another indication of Congressional willingness to vest custody of the agencies in the Chief Executive. Reorganization plans submitted by the President, which take effect if not vetoed by either House of Congress within a specified period,[124] may, within stated limits, transfer, consolidate or abolish agency functions, including rulemaking functions.[125] Thus, while the President's power is carefully confined, the Act allows actions that have foreseeable indirect substantive effects on policymaking.[126]

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[119] Pub. L. 93-344, 84 Stat. 298, 31 U.S.C. 1301, et seq. (1976).

[120] 31 U.S.C. 1402(b) (1976). The Comptroller General appears to have acquiesced in the Executive practice of actually stopping agency spending activities up to 30 days prior to submission of the rescission message. See, Letter to Honorable Jack Brooks, April 13, 1981, B-200685.

[121] 31 U.S.C. 1403 (1976).

[122] 31 U.S.C. 1403(b) (1976).

[123] Reorganization Act of 1977, 5 U.S.C. 901 et seq. (1978 Supp.). The Act was most recently renewed in 1980. Pub. L. 96-230, sec. 1, 94 Stat. 329. It lapsed on April 7, 1981.

[124] 5 U.S.C. 906 (1978 Supp.).

Finally, the President may select the chairmen of the major independent regulatory agencies from among their members.[127] In view of the increased authority over policy, personnel and spending vested in these chairmen by reorganization plans,[128] the President is given indirect control over the course of agency policy.

In sum, the foregoing review of Congressional responses to a variety of government operational needs amply demonstrates the legislature's substantive acknowledgement of the President's central role as overall manager and coordinator of the administrative process.

C. Conclusion: Legal Precedent and Congressional Practice Support the Validity of Executive Order 12291

Judicial interpretation of the nature and scope of the President's Article II powers supports the view that a significant managerial role is contemplated for him under the Constitution. Congressional practice reflects acceptance of that role. The exigencies of modern government demand it. The question remains whether Executive Order 12291 falls within the ambit of that power. A proper understanding of the purpose and effect of the Order's provisions demonstrates that it does.

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[125] 5 U.S.C. 903 (a)(2) (1978 Supp.).

[126] The President could transfer rulemaking programs from one agency to another having a different policy orientation.

[127] Zamir, Administrative Control of Administrative Action, 57 Calif. L. Rev. 896, 898-899 and note 161. (1969).

[128] See 5 U.S.C. Appendix (1976).

The Order establishes a system of presidential control over the informal rulemaking process by means of oversight at every stage of rule development. That oversight is guided by stated goals reflecting a desire for maximizing the accountability and efficiency of government operations and minimizing the public impact of government regulations. Those objectives are to be accomplished by directing adherence to procedures which require assessment of the cost and benefits of proposed agency action on society. The process is subjected to public scrutiny be requiring publication of preliminary and final agency cost-benefit assessments, providing for a minimum of 60 days of public comment on a rule, and the establishing of a record to support the legal and factual basis of agency action. Operational control of the program is vested in the Director of OMB who is subject to review by the Presidential Task Force on Regulatory Reform headed by the Vice President. Ultimate appeal of disagreements is to the President.

The scheme of control is different in a number of major respects from those of former administrations. It provides for centralized supervision and guidance of administrative decisionmaking. It establishes uniform procedures that focus on the process and assure faithful adherence to it. By formalizing the process, lines of authority are publicly identified, thus opening government decisionmaking to public scrutiny.

The Order specifically eschews interference with the ultimate discretionary authority of any agency officer and is inapplicable where the Order and statutory requirements are in conflict. Final evaluation of the result of the application of cost-benefit principles is left with the responsible agency officer. Although the process is a conspicuously open one, the ability to determine whether improper undisclosed inputs have occurred is available under the Freedom of Information Act.[129] Finally, the entire process is subject to judicial review.

The Order, properly understood, exercises control over the decisionmaking process, not over the ultimate product of the process. The distinction is of course critical. It is simplistic to say that "procedure determines substance," for that begs the very question at issue and misunderstands the nature of governmental decisionmaking. That process is not nor was it meant to be, a platonic search for truth. It is part of the political process and, in words of the court in Sierra Club v. Costle, may not go "unaffected by political considerations or the presence of Presidential power".[130] The essential question is whether a superior "political" judgment, the legislative vesting of final decisional discretion in a subordinate executive officer, is displaced by any of the terms or the total effect of the Order. It cannot be said that it does.

Deferrals under the Order cannot be indefinite; to require that an agency review existing rules does not mean they will be altered or revoked; and to specify a methodology of cost-benefit analysis does not necessarily impel a particular result. To overlay these requirements of the Order with the spectre of the "power of the office" is to again ignore the essential political nature of the presidency. A fair reading of the removal cases is that if Congress places policymaking responsibility in an executive branch officer without utilizing the means available to it to insulate the officer from presidential influence, nothing can keep the President from exercising his constitutional duty to "supervise and guide", even if it means firing him.

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[129] 5 U.S.C. 551 et seq. (1976). It may be noted that the 1974 amendments to the Act brought the Executive Office of the President under its ambit. See 5 U.S.C. 552(e) (1976).

[130] Sierra Club v. Costle, supra note 92, slip opinion at p. 220.

This view is consonant with the prevailing concept of the separation of powers which emphasizes the practicalities and realities of modern government. As articulated by Mr. Justice Jackson in his concurrence in the Steel Seizure Case:[131]

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress. 132/

In applying this pragmatic view one court has stated that a violation of the separation principle will be found where there is

> ... an assumption by one branch of powers that are central or essential to the operation of a coordinate branch, provided also that the assumption disrupts the coordinate branch in the performance of its duties and is unnecessary to implement a legitimate policy of the Government. 133/

Here the President's constitutionally based executive prerogatives are clear; his purposes in exercising them, to achieve accountability and efficiency in administrative decisionmaking, are legitimate governmental objectives; and Congress remains free to clarify its intentions at any time. Therefore, in the absence of any conflicting or limiting statutory directive, the President has the authority to "supervise and guide" administrative rulemaking in the manner prescribed in Executive Order 12291.

131/ Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952).

132/ A majority of the Supreme Court has since repeatedly given express endorsement of Justice Jackson's view of the separation of powers. Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977); Buckley v. Valeo, 424 U.S. 1, 122 (1976); United States v. Nixon, 418 U.S. 683, 707 (1974); National Association of Letter Carriers v. Austin, 418 U.S. 264, 273 n. 5 (1974).

133/ Rai Chadha v. INS, 634 F. 2d 408, 425 (9th Cir. 1980) (One-house veto of a suspension of deportation following an adjudicative hearing held to violate principle of separation of powers.)

IV. THE CASE AGAINST THE PRESIDENT'S AUTHORITY TO CONTROL AND DIRECT ADMINISTRATIVE RULEMAKING THROUGH AN EXECUTIVE ORDER

An Executive Order is a presidential direction that the government and/or private parties act in a prescribed way. Although such orders come cloaked with the prestige and aura of that high office, there is no dispute that unless some constitutional or statutory authority supports the directive, it has no legal effect.[134] In rare instances the courts have found a constitutionally specified power of the President to support an order.[135] Most often, however, Executive orders have been sustained when issued pursuant to a specific Congressional authorization.[136] Less often, subsequent legislation has ratified an earlier order.[137] Some cases have even held that continued Congressional funding of a program created by executive order constitutes sufficient ratification.[138]

Executive Order 12291, which seeks to control and direct the administrative rulemaking process of executive branch agencies, is not supported by an express provision of the Constitution. The Framers of the Constitution did not intend to invest the Chief Executive with a general power to direct and control the administrative acts of subordinate federal officers. Any powers exercised by the President in this area, therefore, must emanate from statutory delegations or the clear implication of a course of legislative action. Consistent Congressional practice, however, rejects any notion of an intent to repose general managerial authority in the President. Moreover, the Administrative Procedure Act specifically contradicts and precludes the administrative scheme established by the Order. Finally, the procedural framework of Executive Order 12291 presents facial due process defects in that it provides access to the process by government and non-government interests without safeguards against secret communications or the exercise of undue influence. The Order, viewed in its totality, is therefore an unconstitutional act of executive legislation in violation of the separation of powers principle.

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[134] Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[135] See, e.g., Armstrong v. United States, 80 U.S. (13 Wall.) 154 (1872); Jenkins v. Collard, 145 U.S. 546 (1892); Lapeyre v. United States, 84 U.S. (17 Wall.) 171 (1873).

[136] National Association of Letter Carriers v. Austin, 418 U.S. 264, 273 n. 5 (1974); Cole v. Young, 351 U.S. 536 (1956); United States v. Kelley, 342 U.S. 193 (1952); Jones v. United States, 137 U.S. 202 (1890); AFL-CIO v. Kahn, 618 F. 2d 784 (D.C. Cir. 1979) (en banc), cert. denied, 99 S. Ct. 3107.

[137] Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); Prize Cases, 67 U.S. (2 Black) 635 (1862); Contractors Association v. Schultz, 442 F. 2d 159 (3rd Cir. 1971).

[138] Fleming v. Mohawk Co., 331 U.S. 111, 118-119 (1942); Brooks v. Dewar, 313 U.S. 354 (1941); United States v. Midwest Oil Co., 236 U.S. 459 (1915).

A. Article II Was Not Intended to be a Grant of General Managerial Power to the President to Control the Administrative Decisionmaking Process

It is well understood that, notwithstanding their experience under the Articles of Confederation, the Framers of the Constitution did not intend the presidency to be an institutional competitor to the Congress. The constitutional role of the Executive, at least in domestic matters, was to be ancillary to that of the legislature.[139] Thus there was no conception of the President as an administrative manager with a general power to control the acts of executive officers. In the words of a leading constitutional scholar:

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[139] Tribe, American Constitutional Law, 161, 181 (1978); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

> [I]t was undoubtably intended that the President should be little more than a political chief; that is to say, one whose function should, in the main, consist in the performance of those political duties which are not subject to judicial control. It is quite clear that it was intended that he should not, except as to these political matters, be the administrative head of the Government, with general power of directing and controlling the acts of subordinate Federal administrative agents. [140]

The first and subsequent Congresses acted consistently with this circumscribed conception of the Office by creating the executive departments in a manner indicating that it felt that formal presidential control over execution of the laws was purely a matter of legislative authorization. In establishing the Departments of Foreign Affairs (predecessor to the State Department),[141] War,[142] and Navy,[143] Congress recognized that the President should have full control over those officers who would perform highly sensitive and highly political functions which the Constitution explicitly vests in the Chief Executive, such as the conduct of foreign affairs and the command of the armed forces. Those statutes explicitly gave the President direction over those departments. But this power of direction was omitted from the domestic departments such as

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[140] 3 Willoughby, The Constitutional Law of the United States, 1479-1480 (2 ed. 1929); see also 1 Goodnow, Comparative Administrative Law, 51-54 (1893); Jaffee, Invective and Investigation in Administrative Law, 52 Harv. L. Rev. 1201, 1203, 1238 (1939); Corwin, The Steel Seizure Case: A Judicial Brick Without Straw, 53 Colum. L. Rev. 53 (1953); Zamir, Administrative Control of Administrative Action, 57 Calif. L. Rev. 866, 869-870 (1969); Karl, Executive Reorganization and Presidential Power, 1977 Sup. Ct. Rev. 1, 10-11 ("Nor did [the Framers] conceive of the presidency as an institutionalized representation of popular will distinct from, let alone capable of opposition to, the will expressed by the legislature.").

[141] Act of July 27, 1789, ch. 4, sec. 1, 1 Stat. 29.

[142] Act of August 7, 1789, ch. 7, sec. 1, 1 Stat. 50.

[143] Act of April 30, 1798, ch. 35, sec. 1, 1 Stat. 553.

Treasury,[144] the Post Office,[145] and the Interior Department.[146] The Treasury Department statute did not even mention the President and required the Secretary to make reports to Congress "and generally to perform all such services relative to the finances, as he shall be directed to perform."[147] Such direction, as the context makes clear, was to come from Congress, not the President. Indeed, for a significant period in our early history, the President did not see department budget estimates before the Treasury Department transferred them to Congress, and the Secretary even recommended tax policy to it.[148] Similarly, the Postmaster-General was given detailed discretionary duties, including the authority to enter into contracts for post roads, and there is no suggestion that in the exercising of these tasks that he was to be under other than Congressional direction.[149]

Interestingly, the view that subordinate executive officers are subject to the dictates of the Congress and not the directions of the President, notwithstanding the "take Care" clause, is consistently reflected in opinions of the Attorney General throughout the nineteenth century. An early such opinion concerned the President's authority to review decisions by auditors regarding the level of veterans' pensions. Congress had given the Comptroller exclusive authority to set such pensions, but many pensioners tried to appeal his decision directly to the President. Attorney General Wirt advised the President that the Comptroller had exclusive authority under the statute:

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[144] Act of September 2, 1789, ch. 12, sec. 2, 1 Stat. 65, 66.

[145] Act of May 8, 1794, ch. 23, sec. 3, 1 Stat. 357.

[146] Act of March 3, 1849, ch. 108, sec. 1, 9 Stat. 395.

[147] See Note 144, supra.

[148] White, The Jacksonians, 78 (1954); White, The Federalists, 326 (1965).

[149] Willoughby, supra note 140, p. 1480. Professor Goodnow remarked about this unusual administrative organization as follows: "In the United States, the original conception of the head of department was that of an officer stationed at the center of the government who might have, it is true, in many cases the power of appointment and removal, but who was not supposed to direct the actions of the subordinates of his department.... The conception of a hierarchy of subordinate and superior officers was very dim if it existed at all." Goodnow, supra note 140, pp. 136-137.

> The Constitution of the United States requires the President in general terms, to take care that the laws be faithfully executed; that is, it places the officers engaged in the execution of the laws under his general superintendence; ... But it never could have been the intention of the Constitution, in assigning this general power to the President ... that he should in person execute the laws himself... If the laws, then, require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself. The Constitution assigns to Congress the power of designating the duties of particular officers: the President is only required to take care that they execute them faithfully... He is not to perform the duty, but to see that the officer assigned by law performs his duty faithfully--that is, honestly: not with perfect correctness of judgment, but honestly. 150/

The same conclusion was reached by Attorney General Mason in 1846:

> It is the constitutional duty of the President to take care that the laws be faithfully executed. But the Constitution assigns to Congress the power of particular subordinate officers; and the President is to take care that they execute their duties faithfully and honestly. He has the power of removal, but not the power of correcting, by his own official act, the errors of judgment of incompetent or unfaithful subordinates. 151/

Other Attorney Generals have applied this rule to a variety of other situations where a subordinate was directly vested with authority by Congress. For example, the President was told he could not interfere with a patent decision; 152/ and also that he had no authority to review a department head's

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150/ 1 Op. Atty. Gen. 624, 625, 626 (1823) (emphasis in original).

151/ 4 Op. Atty. Gen. 515, 516 (1846).

152/ 13 Op. Atty. Gen. 28 (1869).

decision as to the lowest bidder on a contract.[153] Finally, an opinion by Attorney General Brewster in 1884, declared that a decision by the Secretary of the Interior not to order a resurvey could not be appealed to the President, because Congress had committed it to the Secretary. The Attorney General there noted that this by now had become a "well settled" question, and he went on to summarize the established rule as follows:

> It has been repeatedly held that the observance of your constitutional duty of taking care that the laws be faithfully executed does not of itself warrant your taking part in the discharge of duties devolved by law upon an executive officer.[154]

The original view of the limited nature of Executive control over the discretionary actions of subordinate officers is confirmed by contemporaneous judicial precedent. Most prominent is Kendall v. United States.[155] Kendall arose out of a statute which empowered the Solicitor to determine how much the Postmaster General owed a group of individuals who had delivered the mail over a number of years. The Postmaster General refused to pay the full amount the Solicitor found owing, apparently at the express direction of the President, whereupon he was sued for the rest. The Postmaster General interpreted his responsibility to be discretionary and argued that only the President could direct the exercise of such discretion.[156]

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[153] 6 Op. Atty. Gen. 226 (1853).

[154] 18 Op. Atty. Gen. 31, 33 (1884). See also 1 Op. Atty. Gen. 624 (1823); 1 Op. Atty. Gen. 705 (1825); 2 Op. Atty. Gen. 507, 508 (1832) (Comptroller's decision "is conclusive upon the executive branch of government"); 2 Op. Atty. Gen. 480, 481 (1831); 2 Op. Atty. Gen. 544 (1832); 5 Op. Atty. Gen. 630 (1852) (presidential interference "would be a usurpation on the part of the President, which the accounting officers would not be bound to respect" unless Congress expressly ordered them to do so); 11 Op. Atty. Gen. 14 (1864); 15 Op. Atty. Gen. 94 (1876). The opinions are not unanimous, however. Cf. 7 Op. Atty. Gen. 453, 469-470 (1855). In Attorney General Cushing's view a denial of the power of presidential direction would allow Congress to "so divide and transfer the executive power as utterly to subvert Government...." The opinion was called "extreme" by a prominent early commentator. Goodnow, The Principles of the Administrative Law of the United States, 81 (1905).

[155] 37 U.S. (12 Pet.) 524 (1838).

The Supreme Court held that the duty in question was ministerial, but key passages in the decision reflect the prevailing view that executive officers are free from presidential direction in carrying out their discretionary functions as well:

> The executive power is vested in a President; and as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power. But it by no means follows, that every officer in every branch of that department is under the exclusive direction of the President. Such a principle, we apprehend, is not, and certainly cannot be claimed by the President.
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> There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character. 157/

The Court made short shrift of the contention that the "take Care" clause carried with it a power of control:

> It is urged at the bar that the Postmaster General was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law, and this right of the President is claimed as growing out of the obligation imposed upon him by the Constitution to take care that the laws are faithfully executed.

156/ *Id.*, at 590-600, 612.

157/ *Id.*, at 610.

> This is a doctrine that cannot receive the sanction of this Court. It would be vesting in the President a dispensing power, which has no countenance for its support in any part of the Constitution and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with the power entirely to control the legislation of Congress, and paralyze the administration of justice.
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> To contend that the obligation imposed on the President to see the laws faithfully executed, implies the power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible. [158]

In United States v. Perkins,[159] the Court established that where Congress vests the power of appointment in some official other than the President, it has the ability to regulate and restrict the manner of removing that appointee. Perkins involved a suit in the Court of Claims for lost wages by a Naval cadet-engineer whom the Secretary of the Navy had dismissed because his services were "not required." Congress had provided that no officer could be dismissed from the armed services except by court-martial. Invalidating Perkins' dismissal, the Court said that "We have no doubt that when Congress, by law, vests the appointment of inferior offices in the heads of departments, it may limit and restrict the power of removal as it seems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict and regulate the removal...."[160]

Finally, in Ex Parte Merryman,[161] Chief Justice Taney, sitting as a circuit judge, denied the right of the President to authorize a suspension of the writ of habeas corpus, and reiterated the limited supervisory conception of the "take Care" clause: "The only power, therefore, which the President possesses, where the 'life, liberty or property' of a private citizen are concerned, is the power and duty... 'that he shall take care that the laws shall be faithfully executed.' He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care they be faithfully carried into execution...."[162/]

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[158] Id., at 612-613.

[159] 116 U.S. 483 (1886).

[160] Id., at 485. The continued validity of Perkins was affirmed in Myers v. United States, 272 U.S. 52, 127 (1926).

[161] 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

Thus the prevailing view of the President's role in the scheme of government established by the Constitution for more than a century of our nation's existence was that of a managerial agent for the legislature.[163/] What is important here is that the view was premised on the assumption that presidential power was not essentially constitutionally based, but emanated from the legislative will, an assumption that traced its roots to the reasons for the founding of the republic in the first place,[164/] and which found its support and justification in the law and governmental practices of the era. Further, that view

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162/ Id., at 149. See also United States v. Grimaud, 220 U.S. 506, 516, (1911), holding Secretary of Agriculture to be an agent of Congress in promulgating "administrative" rules.

163/ As late as 1885, Woodrow Wilson could suggest in his "Congressional Government" that the presidency was at best a ceremonial and symbolic office in need of executive and administrative support from a reorganized Congress. See also, Zamir, supra note 140, pp. 871-873.

164/ "Although much can be said about the colonial experience with monarchy, royal governors, and the like, the conditions of national life at the beginning and through much of the nineteenth century simply did not raise the issues of management on the dynamic and shifting scale that followed the Civil War. The framers had no reason to envisage the management of an industrial nation as the essential function of the office. Whatever managerial insights Hamilton had were confined to commerce, banking, and monetary policy, certainly among the central elements in such management but by no means the only ones. Nor did the framers forecast the development of extensive managerial bureaucracies to tend to social policy and related problems. Quite to the contrary, they assumed local communities to be adequate to that charge. Nor did they conceive of the presidency as an institutionalized representation of popular will distinct from, let alone capable of opposition to, the will expressed by the
(continued)

carries with it the concomitant notion that presidential efforts to control the administrative actions of subordinate officers must find their basis in explicit constitutional provisions, express statutory mandates, or the clearest of implications from a Congressional mandate or course of practice. The lack of prohibition is insufficient in itself to support executive power to control discretion, even indirectly.

On this basis, Article II may not be used alone to support an independent power to execute the laws. The vestment of "executive power" in the President is language that locates the situs of power but not its content. The "take Care" clause simply does not say that the President will execute the laws. The actual wording suggests oversight over execution by other parties rather than direct execution by the President. The ability to require written reports from department heads on their activities does not naturally lead to an inference of power to direct the activities of those who report. Finally, the idea that the power over administrative decisionmaking derives from the President's role as head of the Executive Branch or inheres in the concept of "executive Power" is repugnant with the very purpose of a written constitution establishing divided, limited government.

It will be seen that this reading of Article II has not been altered by the advent of the administrative state and the concurrent expansion of presidential power. Neither modern law or legislative practice has vitiated the ultimate power of the Congress to define the nation's goals or the means to achieve them.

(continued) legislature. Even Hamilton's most strenuous defenses of executive authority emphasized the President's role as the managerial agent for the legislature, not his popular independence in reflection of some other popular will. Finally, the framers of the Constitution had no reason to envisage the vast development of national resources for federal distribution or the gravitation of the power to distribute those resources to the executive branch." Karl, supra note 142, p. 11.

B. Contemporary Case Law Has Not Altered the Original Conception of the Constraints on the Exercise of Presidential Power Over Administration

The concurrent development of the administrative state and the enlargement of the powers of the Office of the President have not been constitutionally impelled. The early notion that the President may not, without Congressional assent, direct the outcome of decisionmaking, particularly in the context of substantive rulemaking, by a subordinate officer in whom discretion is lodged still obtains. A close reading of the modern case law confirms that conclusion.

In Myers v. United States[165] the Supreme Court affirmed a broad authority in the President to remove his subordinate appointees without Congressional consent. But the Court's opinion, normally referenced for its generous reading of the scope of presidential power, nowhere goes so far as to hold that the President may direct the outcome of decisionmaking, at least with respect to the decisions specifically committed by statute to a subordinate. The Court distinguished between the "ordinary duties of officers prescribed by statute"[166] and those duties "so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance."[167] As to the former, the Court held that "the ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone."[168] But then having said this, Chief Justice Taft makes it clear that the Chief Executive's power to "supervise and guide" his subordinates in the conduct of "ordinary duties"[169] prescribed by statute does not extend to the rulemaking and adjudicatory functions committed by law to the subordinates discretion. While the Court held that the President had the authority to remove the subordinate if he thought he had exercised that discretion negligently or inefficiently, he could not exercise that power before the fact; that is, before the subordinate had personally exercised the personally committed discretion.

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[165] 272 U.S. 52 (1926). See discussion, supra notes 77-78 and accompanying text.

[166] Id., at 135.

[167] Id.

> Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates are subjects which the President must consider and supervise in his administrative control. Finding such officers to be negligent and inefficient, the President should have the power to remove them. Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground

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[168] Id.

[169] Viewing the structure of this critical paragraph it is arguable that by "ordinary duties" Taft meant ministerial tasks or purely administrative duties not involving substantive decisionmaking since that passage is immediately followed by passages that clearly set apart rulemaking and adjudicatory functions. If so, the power to "supervise and guide" is of minimal substance.

> that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed. [170]

The requirement is not an empty procedural nicety. It speaks in two major respects to the relation of the removal power to the overall power of the President to control administrative decisionmaking and underlines the continued efficacy of the doctrine of Congressional primacy in domestic policymaking. First, the fact that the President may remove such officers only after the fact indicates the Court's acknowledgment that the President's control of such policy determinations is at best indirect. Of course the threat of removal gives him great influence; but the decision that caused the removal remains unaltered, and perhaps unalterable,[171] until a new subordinate is appointed and acts to reverse the offensive action.[172] Such an indirect method of control does not bespeak an awesome expansion of presidential power. Second, after the fact power of removal gives Congress notice of the dispute and an opportunity to act by making its legislative intent on the matter clear or by refusing to confirm a new nominee if it is an advice and consent position. It thus has the effect of partially preventing secret or undue Executive influence in an area committed to a particular subordinates discretion.

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[170] 272 U.S. at 135.

[171] Due process, for example, may prevent the withdrawal of a property right granted.

[172] The difficulties that may be encountered, and the occasional inefficacy of the use of the removal power to alter the course of discretionary decisionmaking, was dramatized in aftermath of the Saturday Night Massacre. See *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973) (holding that Acting Attorney General Bork had illegally dismissed the Watergate prosecutor).

Whatever potential for the broad expansion of Executive control _Myers_ appeared to give, the Court has taken back in two subsequent removal cases. In _Humphrey's_[173] and _Wiener_[174] the Court underlined the special nature of the rulemaking and adjudicatory functions and the ability of the Congress to insulate the decisionmaker from removal _as well as_ from interference with the performance of those tasks during the decisionmaking process. _Humphrey's_ involved the President's attempt to remove a Member of the Federal Trade Commission without cause although the statute precluded removal for reasons other than "inefficiency, neglect of duty, or malfeasance in office." In rejecting the idea of an illimitable presidential removal power, the Court emphasized the distinction between officials who performed purely executive duties and those officials who carried out rulemaking and adjudicative tasks. By this means the Court distinguished _Myers_ without overruling it:

> The office of a postmaster is so essentially unlike the office now involved that the decision in the _Myers_ case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the _Myers_ case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. [175]

The Federal Trade Commission, on the other hand, was vested with extensive legislative and judicial duties that could not come under the control of the Executive:

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[173] _Humphrey's Executor_ v. _United States_, 295 U.S. 602 (1935).

[174] _Wiener_ v. _United States_, 357 U.S. 349 (1958). See _supra_ notes 79-83 and accompanying text for discussion.

[175] 295 U.S. at 628.

> The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. 176/

Similarly, in Wiener, the Court overruled an attempted presidential removal from the War Claims Commission and reiterated the distinctions made in Humphrey's. It found that Congress intended the Commission to be protected from presidential review because it was an adjudicating body charged with deciding claims on the merits, entirely free of influence from any other branch of government. Wiener's removal was illegal because Congress did not want the commissioners to fear "the Damocles' word of removal by the President for no reason other than that he preferred to have ... men of his own choosing." 177/

The distinction between the "ordinary duties of officers prescribed by statute" (purely executive functions) and rulemaking and adjudicatory functions, first hinted at in Myers, and made substantive by Humphrey's and Wiener, is one of crucial importance. First, Humphrey's implicitly established the constitutional legitimacy of agencies combining executive, legislative and judicial functions, the so-called independent regulatory agencies. Second, and equally important, the removal cases, taken together, establish that Congress may take significant measures to protect the integrity of functions it places in settings that are potentially inimical to their being inplemented in the manner Congress intended. That is, the Court recognized Congress' right to maintain a substantial degree of control over legislative and adjudicative delegation of authority to administrative agencies.

176/ Id.

177/ 357 U.S. at 356.

This is most clear and easily accepted and understood with respect to officers delegated adjudicative functions. Congress has made the choice to place the trial of certain violations of public policy, such as in the areas of antitrust or labor relations, in an administrative setting rather than the courts for a variety of reasons including avoiding a hostile judicial forum.[178] The adjudicative proceeding, like a judicial trial, applies policy to past actions which will result in an order for or against a named party. Unlike Article III judges, however, administrative adjudicators do not have life tenure and may be subject to superior officer pressures to the detriment of parties to the proceedings. Thus Congress protects the integrity of the process by imposing procedural requirements, regulating *ex parte* contacts, and sometimes, as with independent regulatory agencies, by prohibiting removal except for cause. Protection of this due process value in such a setting is therefore deemed appropriate although it is not often recalled that source of the adjudicatory authority in the first place is Congress and not the agency in which it reposes.

Similarly, what appears to be lost in the current debate over who controls the nation's bureaucracy, and the manner of that control, is a perception of the true nature of the rulemaking authority of administrative agencies. Rulemaking power is of course a pre-eminent feature of the modern administrative agency. Though the promulgation of rules has been a normal feature of American government from its very inception, it is only during the present century that rulemaking authority has brought about a shift in the center of gravity of lawmaking. The advent of the modern administrative state has brought with it a requirement for a magnitude of legislation unforeseen by the Founding Fathers. As a consequence, Congress has not been able to directly perform its now greatly expanded tasks of regulation and guardianship of the public weal. It has been required to delegate the task of legislation to its administrative creations. Today, administrative legislation dwarfs the primary legislation of Congress.

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[178] Other reasons may be the need for expertness, specialization, continuity of administration, or to handle a large volume of cases, among others. See generally, Senate Committee on Governmental Affairs, "Study on Federal Regulation", Vol. V, Regulatory Organization, pp. 26-32, 95th Cong., 2d Sess. (1977) (hereinafter Federal Regulation Study).

Moreover, as a concomitant of this development, and as a result of the complexity and breadth of the subject of regulation, modern statutes delegating rulemaking authority, have blurred the line between principle and detail. Because of the vastness of the delegations now required, the legislative mandate is a mere skeleton; what is left to the delegate are not minor details, but the formulation of many of the essential principles in the law as well. Rulemaking today extends to the essence of the legislative scheme. In many instances, the rules and regulations may be of greater practical importance to those subject to an agency than are the broad provisions laid down by the Congress.

Further, properly promulgated rules and regulations have the same legal effect as statutes. Their provisions have the force of law and they are backed by the same sanctions as statutes, including in many instances the criminal sanctions designed to coerce obedience to the law. Thus while administrative legislation may be only quasi or sublegislation, since its provisions are subordinate to those enacted by the legislature, this does not alter the fact that its impact is comparable to that of statute law itself.

The source of this enormous administrative power must at all times be kept in mind, however. Legislative power exists as a result of a delegation.

An administrative agency possesses rulemaking authority because a statute has delegated such authority. Without a statutory delegation, an agency does not have power to promulgate substantive rules and regulations. For an agency to be vested with authority to affect substantive rights and obligations through rules and regulations, rulemaking power must be delegated to it expressly.[179/]

The validity of the modern practice of broad delegations of Congressional lawmaking authority is not in doubt.[180/] What appears to have been obscured, however, is the fact that judicial validation of such extensive delegations has not changed the essential nature of what is being delegated and the process of which is a part: rulemaking remains lawmaking even when it is performed by an administrative agency; and lawmaking remains a task committed by the Constitution to the Congress. Ultimate constitutional accountability for legislation rests with the legislature. Although the exigencies of modern government have required that Congressional responsibility for lawmaking be shared with Executive branch agencies, the ultimate constitutional responsibility, and therefore, control, remains with the Congress.

The quintessential legislative nature of substantive administrative rulemaking is well established in law. The issue has arisen in cases in which courts have been faced with the question of the applicability of procedural due process requirements to rulemaking proceedings of administrative agencies. The uniform answer of the courts has been to treat the administrative exercise of legislative powers similarly to the direct exercise of power by the legislature. The agency was found to be no more bound by constitutional procedural

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179/ See, e.g., Brennan v. Stark, 342 U.S. 451 (1952).

180/ See, Yakus v. United States, 321 U.S. 414 (1944); Lichter v. United States, 334 U.S. 742 (1948); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971) (3-judge court).

requirements than the legislature itself when it enacts a statute. Since procedural due process does not limit the legislature, the same principle has been consistently applied where rulemaking powers were exercised under legislative delegation. As one court has put it: "in legislation, or rulemaking, there is no constitutional right to any hearing whatsoever."[181/]

The leading case in this regard is the Supreme Court's decision in Bi-Metallic Co. v. Colorado.[182/] There the Court sustained an order of the State Board of Equalization increasing the value of all taxable property in Denver by 40 percent, without an opportunity being afforded affected taxpayers to be heard before the order was made. The agency order plainly deprived the taxpayers of property but the Court rejected their claim that due process required an opportunity to be heard. Justice Holmes speaking for the Court analogized the agency's action to direct action by the legislature: "If the result in this case had been reached as it might have been by the State's doubling of the rate of taxation, no one would suggest that the Fourteenth Amendment was violated unless every person affected has been allowed an opportunity to raise his voice against it."[183/] Since the Constitution does not require legislative acts to be done in a town meeting or assembly of the whole, it similarly does not require due process procedural requirements when such legislative authority is validly exercised by a delegate administrative agency.

The Court has since confirmed that when a proceeding is classified as rulemaking, due process ordinarily does not demand procedures more rigorous

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[181/] Willapoint Oysters v. Ewing, 174 F. 2d 676, 694 (9th Cir. 1949).

[182/] 239 U.S. 441 (1915).

[183/] Id., at 445.

than those prescribed by Congress.[184] It has reaffirmed that Congress is under no requirement to hold an evidentiary hearing prior to its adoption of legislation, and that "Congress need not make that requirement when it delegates the task to an administrative agency."[185]

The clear import of these cases is that the nature of lawmaking does not change once there has been a valid delegation of authority to an agency. If Congress had not enacted the Administrative Procedure Act, agencies would be free to administratively legislate in the same manner that Congress makes laws. Conversely, Congress can, and has, legislated general, minimum procedural requirements for rulemaking, in the Administrative Procedure Act, and more specific, detailed requirements with regard to certain regulatory programs.[186] This is in obvious recognition that the vast legislative authority conferred on non-elected, essentially unaccountable administrators needs to be confined and controlled.

More importantly, the source of this authority to impose limiting procedures stems from Congress' exclusive control of the legislative process for which it is ultimately responsible under the Constitution. The constitutional obligation to control the legislative process does not end until that process is complete. Sharing the process with the Executive does not transform its nature and invest it with an executive hue. Execution of the law, and therefore exclusive executive responsibility, begins when there is a law to execute. A substantive agency rule becomes a law when only the procedures prescribed by the Congress for its promulgation are fulfilled.

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[184] See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 524 n. 1, 542, n. 16, (1978).

[185] Bowles v. Willingham, 321 U.S. 503, 519 (1944), citing Bi-Metallic approvingly.

[186] See, e.g., the hybrid rulemaking procedures applied to Federal Trade Commission trade regulation rulemaking proceedings, 15 U.S.C. 57a (1976).

This reading of Humphrey's appears reinforced when it is juxtaposed with another case decided the very same day: Schechter Poultry Corp. v. United States.[187/] In that case the Court rebuked the Congress for failing to maintain proper control over the lawmaking authority it had delegated to the President. It seems hardly coincidental that they were announced together.

The Congress' ability to place limits on Executive removal must also be seen in the broader perspective of its role in the appointments process and, further, with respect to its plenary power over government organization generally.

Thus it is well understood that the appointment power of the President may be limited by subjecting the officer to Senate confirmation or by placing the appointment of inferior officers in the heads of departments.[188/] What is not so well understood is that Congress may further limit the power to appoint through its power to create and define an office and limit who may be appointed to that office.

That the Constitution distinguishes between the creation of an office and appointment thereto has never been questioned. The former is by law and takes place by virtue of Congress' power to pass all laws necessary and proper for carrying into execution the powers which the Constitution confers upon the government of the United States and its departments and offices. As an incident to the establishment of an office Congress also has the power to determine the qualifications of the officer and in so doing necessarily limits the range of choice of the appointing power. Since the earliest days of our nation Congress has laid down a great variety of qualifications for holding

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[187/] 295 U.S. 495 (1935).

[188/] Article II, sec. 2, cl. 2.

office including citizenship, residence, professional attainments, occupational experience, age, property, and such sound habits as a demonstrated temperance in the use of alcohol, among others. It has required that appointees be representatives of a political party, of an industry, of a geographic region, or of a particular branch of government. It has confined the President's selection to a small number of persons to be named by others[189] and at times has contrived to designate a definite eligibility, thereby virtually usurping the appointing power.[190] Further, Congress has very broad powers in regulating the conduct in office of employees of the United States, especially regarding their political activities.[191]

Some specific statutory enactments limiting the choice of the President may be noted. In establishing the original Railway Labor Board in 1920 Congress provided that the President would appoint three members from six nominees named by employees and three from six nominees named by carriers.[192] In establishing a commission to sell coal and asphalt deposits in Indian lands, two members of the commission were required to be Indians.[193] In establishing a Women's Bureau in the Department of Labor, Congress required that the

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[189] See citations collected in *Myers* v. *United States*, 272 U.S. 52, 240, 265-274 (1926) (Brandeis, J., dissenting). See also L. Mayers, The Federal Service, 39, 40-64 (1922); Note, 42 Harv. L. Rev. 426 (1929).

[190] See data in E. Corwin, The President: Office and Powers 1787-1957, (4th ed. 1957), 363-365. See also, Schwartz, The Powers of Government: The Powers of the President, Volume II (1963), pp. 43-45.

[191] *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947) (Hatch Act held constitutional); see also, *Arnett* v. *Kennedy*, 416 U.S. 134 (1974) (removal to promote efficiency of service not an unconstitutionally vague standard).

[192] 41 Stat. 456, 470 (1920).

[193] 32 Stat. 641, 654 (1902).

Director of the Bureau be a woman. The Civil Service Act of 1883 left the appointing officer the right to select from "among those graded highest on the result of the competitive examinations" for which the act provides, and executive orders and amendatory legislation have customarily restricted choice to the three highest.[194] Section 10 of the original Federal Reserve Act established a five-member Board to be appointed by the President, no more than one of whom could be from any single Federal Reserve district, and at least two of whom had to be experienced in banking and finance.[195] In 1922 the Act was amended to provide that one member be appointed who was representative of agricultural interests.[196]

While there have been no court decisions directly construing these or similar limitations, it seems clear that as long as the President's choice is only narrowed but not eliminated it will be upheld.[197] The distinction between appointment authority and Congressional power to set qualifications and preconditions for holding office, however, was early and clearly recognized by the Supreme Court.[198]

Two post-Myers and Humphrey's Supreme Court rulings also confirm the ability of Congress to protect the discretion of subordinate officers from presidential interference. In United States ex rel. Accardi v. Shaughnessy[199] the Court held that when a federal officer is legally vested with discretionary authority, he may not be directed in the use of that discretion by a superior officer. The Court stated that "If the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience."[200/] The Court then held that the Attorney General could not direct the use of a subordinate's discretion, even where the Attorney General had himself granted the discretion to the subordinate and retained ultimate review of the decision for himself.

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[194] See, e.g., 5 U.S.C. 3317 (1976).

[195] 38 Stat. 251 (1913).

[196] 42 Stat. 620 (1922).

[197] United States v. Ferreira, 54 U.S. (13 How.) 40, 51 (1851); Myers, v. United States, 272 U.S. 52, 128 (1926). Buckley v. Valeo, 424 U.S. 1 (1976), would not appear to be contrary.

[198] United States v. LeBaron, 60 U.S. (19 How.) 78 (1856).

[199] 347 U.S. 260 (1954).

Accardi was subsequently relied on by the Court in United States v. Nixon.[201/] There the Court held that the Watergate Special Prosecutor could sue the President under a regulation issued by the Attorney General which defined the Special Prosecutor's authority and specifically gave him authority to contest the assertion of executive privilege. The Court stated:

> Here, as in Accardi, it is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority. But he has not done so. So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and enforce it. Moreover, the delegation of authority to the Special Prosecutor in this case is not an ordinary delegation by the Attorney General to a subordinate officer; with the authorization of the President, the Acting Attorney General provided in the regulations that the Special Prosecutor was not to be removed without the "consenus" [sic] of eight designated leaders of Congress. 202/

Finally, all these bits and pieces of limitational authority Congress may exercise over the Executive must be seen in the stark light of the ultimate

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[200/] Id., at 266-267.

[201/] 418 U.S. 683 (1974).

[202/] Id., at 696. (Footnotes omitted)

truth so pithily put by Professor Charles Black: "My classes think I am trying to be funny when I say that, by simple majorities, Congress could at the start of any fiscal biennium reduce the President's staff to one secretary for answering social correspondence, and that, by two-thirds majorities, Congress could put the White House up at auction. But I am not trying to be funny; these things are literally true."[203] The theoretical ability of Congress to close up the Government[204] is not the point however; more essential is the firm understanding of the nature of presidential power today. Again in the words of Professor Black: "The one fundamental error is that of supposing that the modern expansion of presidential power is based on the Constitution by itself, and is hence inaccessible as a matter of law to congressional correction."[205]

In sum, it is apparent that Supreme Court rulings in the context of the exigencies of twentieth century governance have not diluted to any significant extent the historic limitations on the exercise of Executive power over administrative decisionmaking. If anything, they have clarified the special status of rulemaking as a category of administrative activity which is presumptively subject to congressional control. Thus it is clear there is neither express nor implied constitutional authority in the President to establish the scheme of control of administrative rulemaking envisioned by Executive Order 12291. That plan would encompass and envelop all official discretion not specifically excepted by statute. This plainly turns the intent of Framers and the teachings of the Supreme Court on their respective heads. The only question that remains is whether Congressional practice has clearly and unmistakably given the President the authority to assume the kind of control he has taken.

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[203] Black, The Working Balance of the American Political Departments, 1 Hastings Const. L.Q. 13, 15 (1974).

[204] It could happen by inadvertence. Through failure to pass re-authorization legislation or a continuing resolution the Federal Trade Commission officially ceased operations on May 1, 1980. A government-wide shutdown was averted on October 1, 1980 by the last minute enactment of a continuing resolution although the bill was not signed into law until late in the day on October 1. Both the Attorney General and the Comptroller General agree that a lapse of appropriations requires a general cessation of government operations. They disagree over the kinds of activities that may be undertaken during such a lapse. See, Report of the Comptroller General, "Funding Gaps Jeopardize Federal Government Operations" March 3, 1981 (PAD, 81-31).

[205] Black, *supra* note 200, at 20.

C. Congressional Practice with Respect to Central Management Generally and Administative Procedure Specifically Manifests No Intention to Cede Control Over Informal Rulemaking to the President in the Manner and Scale Contemplated by Executive Order 12291

In the absence of explicit or implied constitutional power upon which to base the scheme established, support for Executive Order 12291 must be found in a grant of congressional authority; and in the further absence of any directly applicable statutory grant, that authority must be implied from a relevant authorization or congressional practice. However, in view of the circumscribed nature of Article II power, and the pervasive scheme contemplated by Executive Order 12291, the implication of authorization must necessarily be clear, convincing and unmistakable.

No such explicit statutory authority exists, and a review of the major statutory schemes relevant to central management authority leaves no question but that Congress has never manifested an inclination to permit such pervasive Executive control over discretionary decisionmaking generally much less over informal rulemaking in particular.

Perhaps the most formidable collection of authority resides in the Office of Management and Budget (OMB). The agency traces its roots to the Budget and

Accounting Act of 1921[206] which allowed the President to formulate a national budget with the assistance of a Bureau of the Budget (BOB) created at the same time. Previously the budget process was highly decentralized.[207] By 1970, however, BOB was in possession of an impressive array of legal authorities for supervision of virtually all departments and agencies. Those included the requirements that those agencies submit their budget requests for review and approval by the Bureau; that legislative comments and recommendations similarly be submitted for review; and that plans for gathering information from the public be approved by BOB. In addition, the Bureau had express statutory authority at the direction of the President to make detailed organizational studies of the agencies and those agencies were duty bound to furnish data and provide access to records on request of BOB. Yet despite these powers, OMB maintained an image of bipartisan neutrality and its director was viewed as a personal technical advisor on fiscal policy and government organization. Indeed the director was not even subject to Senate confirmation.[208]

This image changed in 1970 with the creation of OMB by reorganization plan.[209] Its ostensible purpose was to take a more active role in the evaluation of program performance in order to judge the overall effectiveness of the programs from a central perspective.[210] The actual exercise of these functions, however, caused public concern, particularly when they were coupled with President Nixon's impoundment of appropriated funds to alter or end established programs.[211/] OMB began to be viewed as a political instrument of the President.[212/] One response was to require for the first time Senate confirmation for the OMB Director and Deputy Director.[213/] Equally significant, Congress has, on a selective basis, either eliminated the clearance requirement on budget requests and legislative recommendations, or mandated concurrent submission of those requests or recommendations so that it can more accurately assess agency needs.[213a/] In addition, Congress has eliminated OMB's final veto authority over information gathering programs of independent regulatory agencies.[214/] Finally, Congress has countered the institutional development of OMB by the enhancement of the authority of its watchdog audit agency, the General Accounting Office, with program evaluation functions and a special oversight role in seeing to it Executive impoundments do not recur;[215/] and also with the creation in 1974 of its own central budget evaluation organization, the Congressional Budget Office.[216/]

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[206] Pub. L. 67-13, 42 Stat. 20 (1921). See notes 93-99 supra and accompanying text.

[207] See Fisher, Presidential Spending Power, 9-10 (1975) arguing that budget leadership by 19th century was not totally absent.

[208] Federal Regulation Study, supra note 175, p. 43.

[209] Reorganization Plan No. 2 of 1970, 84 Stat. 2085.

[210] Message of the President Relative to Reorganization Plan No. 2, 35 F.R. 7959 (1970).

The picture that emerges is clearly not one of Congressional acquiescence. Certainly it cannot be denied that there is a direct relation between budget

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[211/] See Fisher, *supra* note 204, pp. 147-174.

[212/] Federal Regulation Study, *supra* note 175, pp. 43-44.

[213/] Pub. L. 93-250, 31 U.S.C. (1976).

[213a/] See, *supra* note 100 and accompanying text.

[214/] The Paperwork Reduction Act of 1980 returned oversight responsibility to OMB but an independent regulatory agency may override any OMB veto by a majority vote. 44 U.S.C. 3507(c).

[215/] See, *e.g.*, 31 U.S.C. 1405-1406 (1976) (provision for oversight and court action by Comptroller General on impoundments); 31 U.S.C. 1151-1157 (1976) (program evaluation authority).

[216/] 2 U.S.C. 601-604 (1976).

control and policymaking. But Congress has demonstrated, by the development of its own institutional counterweights and the exercise of its ability to modify or withdraw OMB authority it deems offensive, that it has not and will not abdicate control over administrative policymaking to the President. Moreover, it should be noted that the sum of OMB's authorities are directed to the legislative process. There is no support for the notion that Congress has given it, even impliedly, the authority to direct or control rulemaking decisions on either a specific or general basis.

Further evidence that Congress means to maintain control over administrative policy development and effectuation appears in the Budget and Impoundment Control Act of 1974.[217] passed in reaction to President Nixon's assertion that he had inherent authority to impound appropriated funds[218] and thereby control the direction of agency policy. The statute severely restricts the Executive's power to impound. Although it allows for the possibility of deferral or rescission and short (45 days) periods when agency spending can be suspended, all impoundment actions are subject to a one-House veto and agency spending is under constant surveillance by the Comptroller General who has authority to seek court assistance in the face of violation of the provisions of the Act.[219] Congress has thus shown that it can be an effective advocate and protector of its prerogatives where control of policy is at stake.

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[217] Pub. L. No. 93-344, 88 Stat. 297 (1974), codified in part at 31 U.S.C. 1400-1407 (1976).

[218] See Local 2677, American Federation of Government Employees v. Phillips, 358 F. Supp. 60 (D.D.C. 1973), holding that the President had no inherent authority to impound. All other reported cases dealt with issue whether the statute in question specifically permitted impoundment. They were generally found not to have. See, *e.g.*, Train v. City of New York, 420 U.S. 136 (1975); State Highway Commission of Missouri v. Volpe, 479 F. 2d 1099 (8th Cir. 1973); Pennsylvania v. Lynn, 501 F. 2d 848 (D.C. Cir. 1974).

[219] 31 U.S.C. 1406 (1976).

Reorganization of Executive Branch agencies is another area in which Congress has shown an ability to balance the need for effective government organizational structure to carry out its policies with the perception that control of organization can carry with it control of policy. Thus all reorganization acts since 1932, with two short lived exceptions, have been accompanied by provisions for legislative veto of a presidential plan.[220/] Moreover, all have been limited in duration, none being effective for more than four years. Several have been allowed to expire without renewal.[221/] The most recent reorganization authority, which lapsed on April 7, 1981, contained a number of severe restrictions that had not appeared in prior versions. The Act specifically prohibited the President from abolishing "any enforcement function or statutory program,"[222/] or submitting a plan that would have the effect of creating a new executive department, abolishing or transferring an executive department or independent regulatory agency, or consolidating two or more executive departments or two or more independent regulatory agencies.[223/] Again then, Congressional control in this aspect of central administrative management is readily apparent and provides no support whatsoever for an implied authority for executive intervention in the rulemaking process.

[220/] One exception is found in the Economy Act of 1933, 47 Stat. 1518, sec. 403(c), which gave President Roosevelt unfettered reorganization authority. See generally, Fisher and Moe, Delegating With Ambivalence: The Legislative Veto and Reorganization Authority, in Studies on the Legislative Veto House Committee on Rules. 96th Cong., 2d Sess. (1980). The other appears in the First War Powers, Act of December 18, 1941, 55 Stat. 838, Title I (1941).

[221/] The authority was allowed to lapse in April 1973 and was not revived until April 1977. See Fisher and Moe, *supra* note 220.

[222/] 5 U.S.C. 903(a)(2) (1978) Supp.).

[223/] 5 U.S.C. 905(a)(1) (1978 Supp.).

An area in which it might have been presumed that executive control would be paramount because of its intimate relation with the executive function generally is that of litigation supervision. Indeed, general statutory provisions vest central control of litigation in the Attorney General, [224] but in actual fact Congress has effected a Balkanization of the Justice Department's litigation authority scattering it in a variety of ways amongst the agencies of government. [225] One commentator has observed that the struggle over litigation control has been marked by

> ... a continuing effort by Attorneys General to centralize responsibility for all government litigation in Justice, a continuing effort by many agencies to escape from that control with respect to civil litigation, and a practice by Congress of accepting the position of the Attorney General in principle and then cutting them to pieces by exceptions. [226]

The authority so dispersed ranges from power to initiate and deferd lawsuits to an ability to appeal to the Supreme Court. [227] At present at least 27 departments and agencies, including seven executive departments and four government corporations, are authorized by statute to take some of their own cases to court. [228]

Implementation of an agency's regulatory mission often requires resort to the courts. Suits are necessary to enforce agency orders, to obtain necessary information, and to enjoin violations of statutes or agency rules. Agencies may have to defend their rulemaking or enforcement activities against challenges which subject them to judicial review. Therefore, who controls and manages such litigation--from deciding whether to initiate or defend, selecting litigation theories and strategies, or whether to settle or appeal--can have a decided impact on the direction regulatory policy will take. Congressional policy in this area reflects a plain disregard for central management and control.

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[224] See 28 U.S.C. 516, 518, 519 (1976). It may be noted that prior to the creation of the Justice Department in 1870, the Attorney General had virtually no control over U.S. Attorneys in the field. This was one of the major reasons for its establishment.

[225] See generally, Federal Regulation Study, *supra* note 175, pp. 54-67.

[226] *Id.*, at p. 55 quoting Professor John Davis.

[227] *Id.*, at pp. 57-63.

[228] President's Reorganization Project, "Data on the Federal Legal System", Office of Management and Budget, pp. 23-28 (January 1979).

Finally, the clearest, most persistent, and eagerly pursued current Congressional indication of its desire to maintain control over administrative decisionmaking in general and agency rulemaking in particular is its acceptance and utilization of the legislative veto.[229/] This mechanism is now a commonplace in the legislative oversight arsenal. It is more and more the legislative oversight device of first resort. Its inherent nature is antithetical to executive control. Its phenomenal proliferation, and its encompassment of the entire range of administrative activities from rulemaking to purely executive decisions, is in itself a refutation of a contention that there exists any implication of Congressional acquiescence in any course of legislative practice remotely relevant to agency rulemaking.

In sum, general statutes do not provide implied authority for the direction and control over informal rulemaking that is explicit and implicit in Executive Order 12291. If anything, the pattern of congressional activity, particularly over the last decade, carries the contrary implication in its careful delineation of the limits on the power granted to the President or White House agents concerning the substantive effects of their actions. Thus OMB authority is

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[229/] See footnotes 12-16, supra and accompanying text.

carefully circumscribed by statutory exemptions from review control and by the institutional counterweights of the Comptroller General and the Congressional Budget Office. The Reorganization Act, when allowed to be viable, is hedged by limitations which narrow the ability of the Executive to directly affect the substance of decisionmaking. The Impoundment Act authorizes at best temporary spending deferrals. And the phenomenon of the legislative veto, specifically applicable to both the Reorganization and Impoundment Acts, hovers like a "brooding omnipresence," threatening all Executive action.

D. Executive Order 12291 Is a Substantive Amendment of the Administrative Procedure Act and Is Therefore an Unconstitutional Arrogation of Legislative Power by the President

The dominant purpose of the framers of the Administrative Procedure Act (APA)[230/] was to create institutional safeguards for the administrative process by means of neutral internal agency procedures and machinery. Procedures were seen as means to the end of fair implementation of government programs and their efficacy was to be measured by their contribution to that end. The focus of the Framers, and the final product of their efforts, the Act itself, is on the individual agency. There is neither a role for, nor even a mention of, the President in the Act, or its legislative history. Indeed, in the area of informal rulemaking, the singular innovation of the APA, the clear intent is to emphasize maximum flexibility and informality free of any extra-agency control in order to bring to bear agency expertise on situations in a fair and expeditious manner. The only outside participation explicitly contemplated was that of the affected public. Moreover, a specific provision of the Act places maximum discretion in the agency to determine whether to initiate

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[230/] 5 U.S.C. 551 *et seq*. (1976).

rulemaking proceedings. On the other hand, a proposal for a central coordinating agency was specifically rejected out of fear it would evolve into a "superadministrative agency" that would interfere with the operation of the individual agencies.

Executive Order 12291 turns the principles and purposes of the Act on their heads and ignores its clear, contrary legislative history, as well as provisions of the Act itself. It creates a central super-coordinator of unilaterally created uniform, substantively oriented procedures. It takes out of the hands of the individual agencies not only the method and means of informal rulemaking but, effectively, the statutorily reserved prerogative of an agency to decide whether to make a rule or not. Executive Order 12291 is an unauthorized substantive amendment of the Administration Procedure Act and therefore an unconstitutional arrogation of legislative power by the President.

Both the Senate and House reports on the APA[231] acknowledge the Brownlow Report[232] as the starting point for understanding the origins of the Act. That Report was commissioned by President Roosevelt in 1936 to make a study of administrative management in the federal government. The study was conducted against a backdrop of opposition to the rapidly proliferating substantive programs of the New Deal which took the form of complaints, sometimes well founded, as to the fairness and regularity of the new agencies' procedures.[233] The Report concluded that the independent regulatory commissions were a "headless 'fourth branch'" uncontrolled by Congress or the Executive, that acted "under conditions of virtual irresponsibility."[234] The Report saw the independent agencies as obstructing effective overall management and frustrating the President's role as "the general manager of the United States." The Report proposed, among other things, that some 100 independent agencies, administrations, boards and commissions be placed within the executive departments, including two newly-created ones. The principal thesis of the Report was that the Executive Branch ought to be reorganized to create an integrated, hierarchical structure with the President as an active manager.[235]

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[231] Administrative Procedure: Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess., 189, 241-242 (1946) (hereinafter APA Legislative History).

[232] President's Committee on Administrative Management, Report with Special Studies (1937) (hereinafter Brownlow Report).

[233] See Robinson, Gellhorn and Bruff, Administrative Process, 34-35 (1980); Verkuil, The Emerging Concept of Administrative Procedure, 78 Colum. L. Rev. 258, 269-270, 273-274 (1978) (hereinafter Verkuil, Administrative Procedure).

Contemporary scholars objected strenuously that the concept of the President as "general manager" was counter to the role of the Executive envisioned in the Constitution.[236] Significantly, this concept was quickly dropped, and was not to appear again until after the passage of the APA. In its place, critics pushed for a highly judicialized procedural system which received its embodiment in the Walter-Logan bill[237] introduced in the Congress in 1939. With regard to adjudication, it created a dichotomy between single and multi-headed agencies and provided for trial-type hearings to be conducted by a three-member hearing board in single-headed agencies and by a single examiner in multiheaded agencies. Any person "aggrieved" by a decision of any officer or employer of any agency could demand such a hearing. The rulemaking section provided that all rules "affecting the rights of persons or property" should be issued "only after publication of notice and public hearings."

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[234] Brownlow Report, supra note 229, at 39-40.

[235] Id.

[236] See, e.g., Jaffee, Invective and Investigation in Administrative Law, 52 Harv. L. Rev. 1201, 1203, 1238 (1939).

[237] S. 915, H.R. 6324, 76th Cong., 1st Sess. (1939).

Rules under future statutes were to be issued within one year of the statute's enactment, and rules in existence for less than three years were to be reconsidered within one year after the bill became law "if any person substantially interested in the effects" of the rule so requested. Judicial review could be obtained by any person "substantially interested in the effects of any administrative rule" in the Court of Appeals for the District of Columbia to determine whether such rule was in conflict with the Constitution or the statute under which it was promulgated.

The bill was severely criticized by the legal profession and academics as well as by the Roosevelt Administration, as an attempt to impose a rigid, uniform procedural format upon the diverse functions of the administrative process.[238/] Thus, Attorney General Jackson stated in an opinion to the President:

> The bill proposes to prevent errors and abuses in procedure by setting up a uniform procedure for all agencies. Until now it has been the policy of the Congress to set up in the organic act creating a new agency at least a rough outline of procedures suitable to its distinctive functions.
>
> This bill, however, lays down a series of blanket requirements for the promulgation of rules and the conduct of hearings by administrative agencies and for judicial review of their action. In doing so it amends literally hundreds of statutes. Just what statutes are amended or repealed is not stated, but left to the always debatable implication. It alters drastically the operations of innumerable agencies in innumerable ways. I use the term "innumerable" deliberately, because, while the bill names some agencies excepted, it nowhere names those to which it would apply but covers them only by general description....

238/ The Association of the Bar of the City of New York said: "[W]e think the present bill, under the guise of reform, would force administrations and departmental agencies having a wide variety of functions into a single mold which is so rigid, so needlessly interfering, as to bring about a widespread crippling of the administrative process." Report of the Assoc. of the Bar of N.Y.C. quoted at 86 Cong. Rec. 13943 (1940) (veto message of the President).

> This bill abandons all account of underlying diversities and imposes the same procedures upon agencies as different in structure and function as the Veterans' Administration, the Bureau of Reclamation, the Pure Food and Drug Administration, and the Office of Education. It is as if we should average the sizes of all men's feet and then buy shoes of only that one size for the Army.
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> The Attorney General's Committee on Administrative Procedure, appointed at your direction and consisting of eminent judges, lawyers, and scholars, has been examining administrative procedures in detail in typical agencies, both through a staff of investigators and through hearing the officials themselves. While it has not addressed itself to a consideration of this bill, its interim report indicates a unanimous doubt as to the feasibility of uniform and rigid procedures. The Committee says:
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> > "The Committee's inquiries have made it apprehensive that a too rigid prescription of administrative procedure would, by substituting artificial uniformity for essential variety, abolish many procedures which now fully satisfy the convenience and protect the welfare of great numbers of citizens and would defeat the substantive purposes of many congressional enactments."
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> (86 Cong. Rec. 13944 (1940)).

It passed, however, and was vetoed by the President, who emphasized its procedural rigidities and overjudicialization of the process.[239] He also justified the veto on the lack of any empirical evidence for the type and magnitude of procedural reform contemplated which he promised would be supplied by a study he had commissioned the Attorney General to do.

The 1941 Report of the Attorney General's Committee on Administrative Procedure[240], was immediately recognized as a landmark in the field of administrative law and, together with its underlying 27 studies, are the immediate origins of

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239/ 86 Cong. Rec. 13942-43 (1940).

240/ Final Report of Attorney General's Committee on Administrative Procedure (1941) (hereafter Final Report).

the present APA. The Report dealt with criticisms of agencies which where directed at three points: "the exercise of power to adjudicate in individual cases; the scope of review of administrative action by the courts; and the exercise of delegated power to legislate by rules and regulations."[241] It proposed legislation (1) to create an Office of Federal Administrative Procedure "to study and coordinate administrative procedures, and in general through continuing studies and periodical recommendations, to achieve and stimulate practical improvements in a manner not possible through omnibus legislation;" (2) "to improve, without rigidifying the rule-making process by emphasizing the importance of outside participation prior to issuance of rules, and by permitting interested persons to petition for rules or for amendments;" and (3) to improve the process of formal adjudication by assuring the quality and independence of trial examiners and by stating minimum hearing procedures.[242]

With particular regard to the rulemaking process, the theme of the Report is that agency procedures "should be adapted to giving adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses. They should also be adapted to eliciting, far more systematically and specifically than a legislature can achieve, the information, facts, and probabilities which are necessary to fair and intelligent action."[243] The choice of the manner and means necessary to accumulate the information required to promulgate a fair rule is to be left to the sound discretion of the agencies themselves: "Here, as elsewhere in the administrative process, ultimate reliance must be on administrative good faith."[244]

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[241] *Id.* at 1-2.

[242] *Id.* at 6.

[243] *Id.* at 98.

[244] *Id.* at 104

Methods must continue to be adapted to the problems to be studied, to the characteristics of the agencies employing them, and to the state of existing administrative knowledge of the matters to be dealt with.'[245] At no point in the Reports' discussion of rulemaking is presidential intervention hinted at. The sole focus is on the agency and its ability to adapt procedures to specific problems to produce fair solutions.[246]

Procedural reform took a backseat to World War II but in 1945 Congress resumed consideration of legislation in an atmosphere of reconciliation that produced an agreement about its goals and techniques. As passed, it rejected the uniform procedural system for all agencies that was the hallmark of the Walter-Logan approach and established several fundamental principles that now pervade administration law. First, contrary to the views of many critics, the APA reaffirmed Congress' acceptance of the concept of combined functions; that is, the performance of adjudicatory and prosecutorial functions by one agency. However, the Act sought to provide substantial protection for the fairness of the adjudicatory process by making hearing officers independent officers not subject to agency control of salary, promotion or tenure and prohibiting *ex parte* contacts between the prosecuting staff and the hearing examiners. Second, formal hearing provisions would be triggered by organic agency legislation.[247] Third, the APA imposed an obligation on agencies to keep the public currently informed of their organization, procedures, and rules. Previously, agency rules were neither systematically collected nor readily available.

Fourth, in a major innovation, the Act set out simple procedures for informal rulemaking by which agencies are generally required to provide advance notice of the proposed rule by publication in the Federal Register, to allow public participation in the rulemaking process through written or oral comments (the choice is the agency's), and to accompany final rules with a statement explaining their basis and purpose.[248] Most importantly, the statute declared informal rulemaking to be the preferred method of agency rulemaking. That is, the informal method must be used unless a statute directs otherwise.[249]

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[245] *Id*. at 110. See also Attorney General Jackson's similar characterization, *supra* at p. 235.

[246] Verkuil, Administrative Procedure, *supra* note 233, at 275-276.

[247] See section 5, 5 U.S.C. 554 (1976).

Fifth, the APA provided minimum standards for adjudications and formal rulemaking. In both cases, a specific statutory provision, usually in the agency's enabling act, requires the decision to be based solely on the record of the hearing.[250] Finally, the Act generally restated the existing law of judicial review of agency action. For example, agency rulemakings would be set aside if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[251]

The proposal for an Office of Federal Administrative Procedure was rejected in the Senate on the fear "that such an office -- in addition to involving the creation of another administrative agency -- will be political, will interfere with the independent operation of boards and commissions, will constitute a superadministrative agency, [or] will serve to unduly emphasize and channel complaints respecting the administrative process...."[252]

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[248] Section 4, 5 U.S.C. 553 (1976).

[249] Formal rulemaking is limited to those situations where a statute specifically requires it. See 5 U.S.C. 553(c): "when rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title shall apply instead of this section." The Supreme Court has strictly adhered to this statutory preference. See, e.g., United States v. Florida East Coast Railway, 410 U.S. 224 (1973).

[250] See, 5 U.S.C. 554, 556, and 557 (1976).

[251] See, 5 U.S.C., 706(2)(A) (1976).

[252] APA Legislative History, supra note 231, at 42.

The theme of agency independence to fashion their own rulemaking procedures to suit the needs of individual situations is explicit throughout the accompanying House and Senate reports. "...the bill leaves wide latitude for each agency to frame its own procedures...;"[253/] "But these exceptions [for military or foreign affairs functions and matters relating to agency management or personnel] are not to be taken as encouraging agencies not to adopt voluntary public rulemaking procedures where useful to the agency or beneficial to the public. They merely confer discretion upon agencies to decide what, if any, public rule-making procedures shall be utilized in a given situation within their terms."[254/] "The first sentence [of section 553(b)] states the minimum requirements of public rulemaking procedure short of a statutory hearing... Considerations of practicality, necessity, and public interest as discussed in connection with [section 533(a)] will naturally govern the agency's determination of the extent to which public proceedings may be carried."[255/]

This general objective of maintaining individual agency integrity and flexibility in the informal rulemaking process reflected in the legislative history of the Act, and also in the general provisions of section 553, is most clearly established by the specific requirement of section 553(e)[256/] that agencies allow the public to request the initiation of a rulemaking proceeding:

> Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

The legislative history of the section and the case law interpreting it make it

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[253/] Id. at 256; see also 199.

[254/] Id. at 257; see also 200.

[255/] Id. at 259; see also 200-201.

[256/] 5 U.S.C. 553(e) (1976).

abundantly clear that the decision to act on such a petition is committed solely to the agency being petitioned and its decision is final though subject to limited judicial review in certain circumstances.

Thus the House Report explains:

> This section applies not merely to effective rules existing at any time but to proposed or tentative rules. Where such petitions are made, the agency must fully and promptly consider them, take such action as may be required, and pursuant to section 6(d) notify the petitioner in case the request is denied. The agency may either grant the petition, undertake public rule-making proceedings as provided by sections 4(a) and 4(b), or deny the petition. The mere filing of a petition does not require an agency to grant it, or to hold a hearing, or to engage in other public rule-making proceedings. But the agency must act on the petition in accordance with procedures set up and published in compliance with section 3(a). 257/

The Senate Report is to the same effect but more expansive:

> This subsection applies not merely to effective rules existing at any time but to proposed or tentative rules. Where the latter are published, agencies should receive petitions for modification because that is one of the purposes of publishing proposed or tentative rules. Where such petitions are made, the agency must fully and promptly consider them, take such action as may be required, and pursuant to section 6(d) notify the petitioner in case the request is denied. The agency may either grant the petition, undertake public rule making proceedings as provided by subsections (a) and (b) of this section, or deny the petition. The taking or denial of action would have the same effect and consequences as the taking or denial of action where, under presently existing legislation, the equivalent of a right of petition is recognized in interested persons. The mere filing of a petition does not require an agency to grant it, or to hold a hearing, or engage in any other public rule making proceedings. The refusal of an agency to grant the petition or to hold rule making proceedings, therefore would not per se be subject to judicial reversal. However, the facts or considerations brought to the attention of an agency by such a petition might be such as to require the agency to act to prevent the

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257/ APA Legislative History, supra note 231, at 260.

> rule from continuing or becoming vulnerable upon judicial review, through declaratory judgment or other procedures pursuant to section 10. 258/

The Attorney General's Manual makes the following consistent comments:

> The right to petition under section 4(d) must be accorded to any "interested person". It will be proper for an agency to limit this right to persons whose interests are or will be affected by the issuance, amendment or repeal of a rule.
>
> Every agency with rule making powers subject to section 4 should establish, and publish under section 3(a)(3), procedural rules governing the receipt, consideration and disposition of petitions filed pursuant to section 4(d). These procedural rules may call, for example, for a statement of the rule making action which the petitioner seeks, together with any data available in support of his petition, a declaration of the petitioner's interest in the proposed action, and compliance with reasonable formal requirements.
>
> If the agency is inclined to grant the petition, the nature of the proposed rule would determine whether public rule making proceedings under section 4(a)(b) are required. However, the mere filing of a petition does not require the agency to grant it or to hold a hearing or to engage in any other public rule making proceedings....
>
> The agency need act on the petition only in accordance with its procedures as published in compliance with section 3(a)(2). The denial of a petition is governed by section 6(d)... Accordingly, prompt notice of such denial should be given to the petitioner, together with a simple statement of the procedural or other grounds therefor.
>
> Neither the denial of a petition under section 4(d), nor an agency's refusal to hold public rule making proceedings thereon, is subject to judicial review. Sen. Rep. p. 44 (Sen. Doc. p. 230). 259/

258/ *Id*. at 201-202.

259/ Attorney General's Manual on Administrative Procedure Act, 38-39 (1947). The Attorney General's Manual is normally accorded considerable deference because of the role he played in drafting the legislation. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546 (1978).

The courts have confirmed the essence of the legislative history. The objectives of section 553(e) have been held to be to allow interested persons the opportunity to inform an agency of any errors that may be corrected[260/] and to aid a court on judicial review of rules that result from the petition.[261/] After a petition is filed, the agency must fully and promptly consider the petition and take any necessary action, and give notice of its decision accompanied by an explanatory statement.[262/] But an agency is not required to automatically grant petitions or even conduct hearings on the petitions.[263/] Moreover, one court has indicated that a person may not use section 553(e) to impose on an agency the duty to grant a petition for reconsideration or rehearing when the agency's statute contains no such requirement.[264/]

More generally, the case law interpreting section 553 has been consistently supportive of an agency's right to decide for itself the manner in which it will conduct its rulemaking activities. Thus the Supreme Court has upheld the choice of an agency to promulgate its rules through adjudications rather than informal rulemaking,[265/] and to choose informal rulemaking over a formal hearing on the

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[260/] Tabor v. Joint Board for Enrollment of Actuaries, 566 F. 2d 705, 711 (D.C. Cir. 1977).

[261/] See Geller v. FCC, 606 F.2d 1031, 1043-1047, and note 14 (D.C. Cir. 1979); Investment Co. Institute v. Federal Reserve Board, 551 F.2d 1270, 1281 (D.C. Cir. 1977).

[262/] See 5 U.S.C. 555(e) (1976).

[263/] NORML v. Ingersoll, 497 F. 2d 654, 658-659 (D.C. Cir. 1974); Nader v. FAA, 440 F. 2d 292, 294 (D.C. Cir. 1971); and cf., Geller v. FCC, supra note 261, which indicates the denial of a petition, as opposed to a grant of the petition and a subsequent determination, is not subject to judicial review. 606 F. 2d at 1043 n. 14.

[264/] Laminators Safety Glass Ass'n. v. CPSC, 578 F. 2d 406, 411 n. 15 (D.C. Cir. 1978).

[265/] NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

record when the organic statute of the agency did not clearly dictate that the formal process was required.[266] Most recently, in *Vermont Yankee Nuclear Power v. Natural Resources Defense Council, Inc.*,[267] the Court declared that the lower federal courts could not dictate to the agencies the kinds of procedural devices they had to employ in informal rulemaking as long as the procedural minima required by section 553 were met. Imposition of additional procedural safeguards was specifically left by the Court to the agency itself or to the Congress. *Vermont Yankee* cannot be read as leaving a vacuum in the administrative process to be filled by the President by executive fiat. The Court's opinion itself is a refutation of such a reading. After an examination of the explanatory language regarding informal rulemaking contained in the Senate and House reports and the Attorney General's Manual, the Court concluded that: "In short, all of this leaves little doubt that Congress intended that the discretion of the *agencies* and not that of the courts be exercised in determining when extra procedural devices should be employed."[268] The Court then goes on to on to praise the "inherent advantages of informal rulemaking",[269] indicating that interference with the agency discretion would materially alter the statutory design. It would also require the overruling prior Court precedent. No vaccum was created by *Vermont Yankee*; rather the Court was again supporting the statutory preference for unfettered informal rulemaking.

Finally, it may be noted that in 1949, shortly after enactment of the APA, a bill was introduced in the Senate which would have established the principle of

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266/ *United States* v. *Florida East Coast Railway*, 410 U.S. 224 (1973).

267/ 435 U.S. 519 (1978).

268/ *Id*. at 546. (Emphasis in original).

269/ *Id*. at 547.

superior administrative control in the President for the entire Executive branch, a concept rejected by the Constitution, historical practice and the case law, and most recently by the APA.[270/] The bill would have classified the executive agencies of the Government as principal executive agencies (including the executive departments, the Government corporations and the independent agencies) and subordinate executive agencies (including the boards, bureaus, divisions, and other units that are in one of the principal executive agencies), and further provided that all such executive agencies, principal and subordinate, were merely representatives of and acting for the President. It then stated: "whenever any function is vested by law in any such agency or in the head thereof, such function is so vested in the President and being exercised by the executive agency concerned, or the head thereof, pursuant to authority so to do derived from delegations by the President. In connection with the exercise of any such function, the executive agency and the head thereof is (unless the function be quasi-judicial in nature) at all times subject, in respect of all matters relating to its exercise (including the time, manner, and extent of its exercise), to the direction and control of the President. In the case of subordinate executive agencies and the heads thereof, whenever any function is vested by law in any such agency or the head thereof, such function is, as hereinbefore provided, so vested merely for convenience, and is (unless it be quasi-judicial in nature) at all times subject, in respect of all matters relating to its exercise (including the time, manner, and extent of its exercise), to the direction and control not only of the President but also of the head of the principal

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[270/] S. 942, 81st Cong., 1st Sess. (1949), entitled the General Executive Management Act.

executive agency in which such subordinate executive agency exists or of which it is an organizational unit." The bill was referred to the Senate Committee on Expenditures in Executive Departments, and there it quietly died.

The legislative history of the APA both generally, but with particular regard to informal rulemaking, and its specific scheme and provisions, here particularly section 553(e), are in clear and direct opposition to the design of Executive Order 12291. The Order does no less than supplant the agency role in informal rulemaking contemplated by the APA. Under the plain requirements of the Order the Director of OMB can effectively determine when an agency must undertake a rulemaking, contrary to section 553(e). It prescribes the types of procedures an agency must use in its rulemaking, procedures which are to be uniform across all covered agencies, contrary to manifest intention of the framers of the APA who sought to avoid subjecting all agencies' rulemaking to uniform, procrustean procedural requirement. It imposes the requirement that substantive principles of cost benefit analysis (which principles and their manner of application are determined by the Director) be applied by all agencies when engaged in "major" rulemaking, contrary to the intent of the APA to require only value free procedures. Finally, it superimposes over all agency rulemaking a central coordinating authority to see to it that agency procedures are directed to accomplishing the substantive goals of the Order, again in direct and irrevocable conflict with the APA's rejection of the general manager concept of the Brownlow Report; its rejection of the Office of Federal Administrative Procedure out of the mere anticipation of a possible politicizing effect of central control; and its general rejection of rigidifying, uniformly required procedures that would not allow agency flexibility to deal with individual situations which is the essential hallmark of informal rulemaking.

Nothing has occurred legislatively to the APA since 1946 which would support such presidential action. Its basic structure is the same today as it was in 1946. The amendments to the Act have, if anything, reinforced the original scheme. Thus the Freedom of Information Act of 1966[271] imposed an obligation on the agencies to grant public access to agency records unless specifically exempted from disclosure. In 1974, continuing criticism of the agencies for undue secrecy lead to further amendments of section 552 designed to tighten the exemptions and to penalize agency noncompliance with the Act.[272] The coverage of the Act was expanded to embrace the Executive Office of the President.[273] Finally, the Government in the Sunshine Act of 1976 added an open meetings requirement as well as a prohibition against _ex parte_ contacts in formal _ex parte_ rulemaking.[274] These changes are consonant with the public participation and public disclosure themes evident in the original Act. They in no way support the substantiates overhaul effected by Executive Order 12291.

In view of this analysis of the APA's legislative history, its overall scheme, and some of its particular provisions, the inexorable conclusion must be that the President, through Executive Order 12291, has substantively amended the APA, a legislative act without constitutional or statutory support, and thus in violation of separation of powers principle.

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[271] Pub. L. 89-554, 80 Stat. 383, 5 U.S.C. 552 (1976).

[272] Pub. L. 93-502, 88 Stat. 1561-1564.

[273] 5 U.S.C. 552(e) (1976).

[274] Pub. L. 94-409, 90 Stat. 1242, 5 U.S.C. 552b (1976).

E. Executive Order 12291 Denies Participants in the Rulemaking Process Due Process of Law

The scheme of Executive Order 12291 commands the intervention of the President's closest aides and advisors at the earliest possible moment in the agency rulemaking process. That is its explicit purpose. The Order also makes available a valuable and vulnerable early point of access to the agency decisionmaking process for non-governmental and political interests. This may be its implicit purpose. The process is therefore redolent with the possibilities for secret, undisclosed, and unreviewable communications and contacts by parties interested in influencing the substance of agency action. The Order provides no safeguards whatsoever to protect the integrity of the policymaking process or the interest of the public from such influences. On its face, then, the Order deprives interested persons, now and in the future, of their right to the most essential elements of fair treatment embodied in the notion of due process and is therefore unconstitutional.

A consistent and growing body of federal court decisions has extended due process protections normally associated with adjudicatory proceedings to rulemaking and other informal executive actions to guard against improper governmental and non-governmental influences in agency policymaking. Those decisions embody the recognition that the public has a vital stake in the outcome of administrative matters.

Rulemaking, of course, often involves the distribution of scarce resources or the imposition of duties and obligations. Participants in informal rulemaking proceedings thus have both economic and non-economic interests to protect. Rulemaking of general applicability, like legislation, often confers benefits or penalties of an economic nature or a large class of parties.[275/]

[275/] See, e.g., Home Box Office, Inc. v. Federal Communication Commission,
(continued)

In addition to economic interests, participants have a dignity interest in the proceedings, which includes an "equality of opportunity to be heard."[276] Some rulemaking, though general in form, imposes burdens on one or a few unnamed parties, or deprives them of benefits previously conferred.[277] In such and similar circumstances, the need for due process protection against inappropriate influence is therefore clear.

In addressing the problem of ex parte contacts[278] the courts have identified three fundamental concerns. First, the fairness to interested parties in knowing who has had access to the decisionmaker and what has been said. The courts have held that ex parte contacts violate such basic considerations of fairness in the administrative process. Agency decisions are to be made after a full public airing of all relevant issues and factual disputes.[279] Public participation is a crucial aspect of this principle. But "ex parte communications and agency secrecy as to their substance and existence serve effectively to deprive the public of the right to participate meaningfully

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(continued) 567 F. 2d 9, 18 n. 8 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1978) (regulations for cable broadcasters).

[276] Mashaw, The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value. 44 U. Chic. L. Rev. 28, 52 (1976).

[277] See, e.g., Hercules, Inc. v. EPA, 598 F. 2d 91, 118 (D.C. Cir. 1978) (pollution standards directed at one domestic manufacturer of toxic substances); Anaconda Co. v. Ruckelshaus, 482 F. 2d 1301, 1306-1307 (10th Cir. 1973) (pollution standards directed at single unnamed company).

[278] Ex parte contacts are defined by the APA as "oral or written communication[s] not on the public record with respect to which reasonable public notice to all parties is not given..." 5 U.S.C. 551 (14) (1976).

[279] Sangamon Valley Television Corp. v. United States, 269 F. 2d 221, 234 (D.C. Cir. 1959).

in the decisionmaking process."[280] Due process therefore requires that such contacts be restricted to the greatest extent possible.[281]

Second, the courts have insisted that there be reasoned agency decisionmaking based on some kind of record. Ex parte comments negate the opportunity for outside parties to comment on their substance. The lack of such adversarial discussion of the merits of the comments by the parties is seen as weakening the agencies' decision as a whole: "From a functional standpoint, we see no difference between assertions of facts and expert opinion tendered by the public, as here, and that generated internally in an agency: each may be biased, inaccurate, or incomplete—failings which adversary comment may eliminate."[282]

Third, the courts have questioned their own ability to engage in a meaningful process of judicial review in the face of the existence of ex parte communications:

> ... As a practical matter, Overton Park's mandate means that the public record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings. This course is obviously foreclosed if the agency itself does not disclose the information presented. Moreover, where, as here, an agency justifies its actions by reference only to information in the public file while failing to disclose the substance of other relevant information that has been presented to it, a reviewing court cannot presume that the agency has acted properly, Citizens to Preserve Overton Park, Inc. v. Volpe,

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[280] United States Lines, Inc. v. FMC, 584 F. 2d 519 (D.C. Cir. 1978).

[281] Home Box Office, Inc. v. Federal Communications Commission, supra note 272, 567 F. 2d at 56.

[282] Id. at 55.

> 401 U.S. At 415, 419-20; see K. Davis, Administrative Law of the Seventies § 11.00 at 317 (1976), but must treat the agency's justifications as a fictional account of the actual decision-making process and must perforce find its actions arbitrary. See Ruppert v. Washington, 366 F. Supp. 686, 690 (D.D.C. 1973), affirmed by order, D.C. Cir. No. 73-1985 (Oct. 26, 1976). [283]

A brief review of the leading cases illustrates the manner in which the courts have handled the ex parte issue.

In Sangamon Valley Television Corp. v. United States,[284] the District of Columbia Circuit held that ex parte communications with members of the Federal Communications Commission by several applicants for a VHF television channel vitiated the Federal Communication Commission's allocation of the channel. Although the allocation decision was made in an informal rulemaking proceeding conducted pursuant to section 553, the court held that "whatever the proceeding may be called it involved not only allocation of TV channels among communities but also resolution of conflicting private claims to a valuable privilege, and that basic fairness requires such a proceeding to be carried on in the open."[285]

In Home Box Office, Inc. v. Federal Communication Commission,[286] the District of Columbia Court of Appeals held that undisclosed ex parte communications are improper in informal rulemaking proceedings under section 553. The court found the evidence of ex parte communications consistent with claims of undue industry influence over the Federal Communications Commission[287] and expressed concern that the final agency decision may have resulted from a compromise among the affected industries rather than the commissioners' perceptions of the public interest. Such a procedure, the Court reasoned, would reduce the public discussion of the rules to a sham.[288]

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[283] Id., at 54. See also, United States Lines, Inc. v. FMC, supra note 280, 584 F. 2d at 541-542. See also, Portland Cement Association v. Ruckelshaus, 486 F. 2d 375, 393-394 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F. 2d 615, 649 (D.C. Cir. 1973).

[284] 269 F. 2d 221 (D.C. Cir. 1959).

[285] Id., at 224.

[286] 567 F. 2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

The Court held that widespread and undisclosed ex parte contacts, besides nullifying the public's right to participate in informal rulemaking proceedings under section 553, preclude effective judicial review of agency decisions. The Court reasoned that the decision to treat the promulgation of a rule as the final event in an ongoing process of policy formulation implies the existence of a record comprising "documents, comments, transcripts, and statements in various forms declaring agency expertise or policy" on which the decision is based.[289] This body of material, it stated, constitutes the "full administrative record" which a reviewing court must examine to comply with the Supreme Court's decision in Overton Park.[290] Agency secrecy concerning the presence and substance of ex parte contacts makes it impossible for a court to fulfill its obligation under Overton Park to test an agency's decision for arbitrariness or inconsistency with delegated authority.

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[287] Id. at 53. Between the close of oral arguments and the adoption of its final order, FCC personnel met over 30 times with industry representatives and Members of Congress and not at all with "public interest" intervenors

[288] Id. at 54.

[289] Id.

[290] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), holding that after determining that action is within an agency's authority and is not arbitrary and capricious, the reviewing still must determine whether the agency complied with relevant procedural requirements by an examination of the full administrative record.

The court reasoned that the lack of an adequate public record precluded genuine adversarial discussions among the parties.[291] Noting that prior decisions require disclosure of information in agency files or consultants' reports which the agency has identified as relevant, the court found no reason to treat differently assertions of fact and expert opinion presented by the public. Adversarial comment, the court reasoned, may illuminate fallacies in the contentions of an agency and of parties to a rulemaking proceeding.

Finally, the court reasoned that Sangamon recognized that secret communications with agency decisionmakers are inconsistent "with fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits...."[292] The court regarded policies expressed in the Government in the Sunshine Act and Executive Order 11920 as indicative of the proper scope of Sangamon. Although the Sunshine Act's limitations on *ex parte* contacts are inapplicable to informal rulemaking proceedings, the court found support in the Act's stated policy "that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government."[293] The court found additional support in Executive Order 11920,[294] which prohibits *ex parte* communications between White House staff members and parties interested in presidential approval of the allocation of international air routes. The court considered presidential approval of air routes to be closely analogous to the channel allocation proceeding in Sangamon because both proceedings constitute informal action allocating valuable privileges. The court rejected the Federal Communications Commission's suggestion that the holding in Sangamon extended only to quasi-judicial proceedings.

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[291] 567 F. 2d at 55.

[292] *Id.* at 56.

[293] *Id.*

[294] 3 C.F.R. 121 (1977).

The court held that fairness and the need to preserve effective judicial review of agency action require that once a notice of proposed rulemaking is issued, any agency employee who participates or may reasonably be expected to participate in the decisional process should refuse to engage in ex parte communications with any interested private party relating to the merits of the proceeding. If ex parte contacts nevertheless occur, a record of the communications must be placed on public file immediately, and interested parties must be given an opportunity to comment on the communications.

Shortly thereafter, in Action for Children's Television v. Federal Communications Commission,[295/] a different panel of the same court dealt with a request by petitioners (ACT) that the Federal Communications Commission ban all advertising on children's shows and regulate children's programming to some extent. As a consequence the industry took some self-regulatory efforts and the Federal Communications Commission declined to adopt specific rules. ACT appealed, arguing that the agency's decision was a result of private negotiations between industry representatives and the Chairman which denied the public meaningful participation in the rulemaking proceedings. The court upheld the agency decision, ruling that the requirement that agencies avoid or disclose ex parte contacts should apply only to informal rulemaking proceedings that resolve "competing private claims to a valuable privilege."[296] However, the court's

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[295/] 564 F. 2d 458 (D.C. Cir. 1977).

[296/] Id. at 477.

opinion indicates two general areas in which *ex parte* might prove illegal in the future.

First, the court held that the Federal Communications Commission had "substantially" complied with the APA's public participation requirements. ACT had a full opportunity to comment, and they knew about virtually everything brought to the FCC's attention by any party. Hence, considering the process as a whole, ACT's interests had been adequately protected.[297] This suggests, however, that where *ex parte* contacts are such that some party's interests are not adequately protected, the court will intervene against the agency.[298] Thus, the administrative process *as a whole* must be a fair one, and the agency must take care that *ex parte* contacts do not vitiate that fairness.

Second, the *Children's Television* court stated that in some cases, the nature of the *ex parte* contact alone could invalidate an agency rule:

> We do not propose to argue that [*Van Curler Broadcasting Corp*. v. *United States*, 236 F. 2d 723 (D.C. Cir. 1956)] stands for the proposition that *ex parte* contacts are always permissible in informal rulemaking proceedings—they are of course not—but we do think it can be read as supporting the proposition that *ex parte* contacts do not *per se* vitiate agency informal rulemaking action, but only do so if it appears from the administrative record under review that they may have *materially influenced* action ultimately taken.[299]

Contacts may be said to "materially influence" the agency's action where: (1) there was an intent to influence the agency; (2) the contacts were significant, not trivial; and (3) the contacts did influence the agency or were of such a nature that they could reasonably have done so.[300]

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[297] *Id*. at 470-472.

[298] See *Courtaulds (Alabama) Inc*. v. *Dixon*, 294 F. 2d 899, 904-905 (D.C. Cir. 1961).

[299] 564 F. 2d at 476 (emphasis supplied).

[300] *Jarrot* v. *Scrivener*, 235 F. Supp. 827, 834 (D.D.C. 1964).

In United States Lines, Inc. v. Federal Maritime Commission,[301] the District of Columbia appeals court returned to an explicitly expansive view of the need for due process protections against ex parte contacts, declaring that "[t]he inconsistency of secret ex parte contacts with the notion of a fair hearing and with the principles of fairness implicit in due process has long been recognized."[302] Although the case involved an informal adjudication, the court noted that the "quasi-adjudicatory" procedure in question had to be protected against ex parte communications because the impact of agency action would extend "well beyond the immediate parties involved."[303] The court added that "however we label the proceedings involved here and in our earlier cases, the common theme remains: that ex parte communications and agency secrecy as to their substance and existence serve effectively to deprive the public of the right to participate meaningfully in the decisionmaking process."[304]

Sangamon, Home Box Office, and United States Lines endorse a blanket presumption against the validity of ex parte contacts without regard to the nature of the agency decisionmaking setting, and reflect the general tendency of the courts to view the administrative process as a whole and to apply due process concepts in both regulatory and non-regulatory settings.[305] Even under the

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[301] 584 F. 2d 519 (D.C. Cir. 1978).

[302] Id. at 539.

[303] Id.

[304] Id.

[305] See Verkuil, Administrative Procedure, supra note 233, at 279-293. See also, FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 142-143 (1940); Mathews v. Eldridge, 424 U.S. 319, 348-349 (1976). Attempts by Members of Congress to influence agency decisionmaking in a variety of settings have similarly been condemned on due process grounds. See, e.g., Pillsbury v. FTC, 354 F. 2d 1952 (D.C. Cir. 1966); D.C. Federation of Civic Associations v. Volpe, 459 F. 2d 1231 (D.C. Cir.), cert. denied, 405 U.S. 1030 (1972); Koniag v. Kleppe, 405 F. Supp. 1360 (D.D.C. 1975), modified, 580 F. 2d 601 (D.C. Cir. 1978),

(continued)

Children's Television rationale ex parte contacts would vitiate agency action where the rulemaking involves competing claims to a valuable privilege, the contacts are such that they render the process as a whole unfair, and the contacts "materially influence" the action that is taken.

The situations involved in the foregoing cases, however, pale before the enormity for potential due process intrusions of Executive Order 12291. Those cases dealt with ad hoc instances of undisclosed communications with individual agencies. The Order raises the spectre of official institutionalization of the process of ex parte influence. This is apparent from the design of the Order.[306] All proposed rules of subject agencies, minor or major, and all targeted existing rules, must pass through the Director of OMB at the earliest stages of their development or review. The Director at that critical point has power to determine whether the rules' course will be rough or smooth. The Director can waive all the Orders' requirements. Or, he can designate a rule a major one, whether or not it was so designated by the agency itself, and thereby initiate a process that requires, among other things, the preparation of preliminary and final cost-benefit assessments (RIA's which are designed by the Director), interagency review, further OMB review, and possible deferrals of indefinite duration before an agency will be allowed to publish the rule as final. It is estimated that a major rule will require a minimum seven months to become final under this process.[307] Despite this enormous concentration of discretionary authority over a major segment of the process of federal administrative

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(continued) cert. denied, 439 U.S. 1052 (1978); Texas Medical Association v. Mathews, 408 F. Supp. 303 (W.D. Tex. 1976).

[306] See notes 31-46 supra and accompanying text.

[307] Interview, supra note 2, at 16-17.

decisionmaking, there are no safeguards whatsoever in the Order against any manner of governmental or non-governmental attempts at influence. Only when the Director disagrees with a final RIA does he have to put his objections on the record. There are no requirements that contacts, written or oral, with either OMB or the Task Force, be logged or identified or otherwise brought to light, even though the inherent threat to the overall fairness of informal rulemaking throughout the government has been intensified to an incalculable degree. This is so, of course, because of the focal nature and authority of the new coordinating body itself. But it is also so because of who are most likely to utilize this new access point in the process and how they will use it.

First, and most obviously, is the inevitability of White House intervention by the President himself or through presidential aides. Indeed, the very purpose of the Order is to facilitate and effectuate presidential access and control. Because of the nature of the Office, in the words of one leading commentator, such

> [h]ighly charged White House intervention poses a danger of frustrating the will of Congress as expressed in legislation establishing an agency and defining its mission. The danger is not that express mandates precluding or compelling consideration of economic efficiency will be compromised. The problem is more subtle. White House efficiency experts may have an unwelcome effect upon administrators who implement legislation that has a primary focus on social benefit but is silent about balancing other economic interests. To what extent does Congress have a right to expect agency decisionmakers to be "singleminded" in their fidelity to the announced objectives of the legislative scheme? Will responsible bureaucrats retain their regulatory independence when they receive vigorous pressure from White House advisors with a laudable, but not congressionally emphasized, mission? 308/

308/ Verkuil, supra note 27, at 949-950.

The author was focusing on contacts of a less direct nature and did not have the situation created by the Order in mind. As stated, here the intensity of direct pressure, and therefore the danger alluded to, is magnified.

Second, concern over the integrity of the governmental process is heightened "when White House actions reflect the interests of private industry in emphasizing a cost-minimization regulatory policy. Powerful private lobbies, increasingly frustrated in obtaining preferential access to administrators, can be expected to use White House political advisors to achieve equivalent clout. The expressed fear is that government regulation will be co-opted by private groups through the intercession of the White House."[309] This raises the serious problem of "conduit" contacts. Under the scheme of the Order, the conduits to influence agency rulemaking may be through OMB or, less directly, through the White House to OMB to the agency. Whatever the route, any system that does not insure that such private contacts are revealed must bear a heavy burden of justification, if not a presumption of invalidity. At the very least, the capacity of the courts to review and constitutionally check agency decisionmaking is undermined simply by not knowing, and not having anyone able to bring to their attention, the fact of *ex parte* contacts.

The very nature and design of the Order is an affront to the due process goals of fairness to participants, reasoned agency decisionmaking, and facilitation of judicial review, and renders it unconstitutional on its face. Numerous decisions of the Supreme Court have found facially unlawful governmental action that encourages unconstitutional discriminatory acts or whose reasonably predictable consequence would be a constitutionally prohibited result.

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[309] *Id*. at 950-951.

A series of cases beginning with Reitman v. Mulkey,[310] presents an application of these protective principles. Following the enactment of an "open hearing" law by the California legislature, an initiative and referendum measure was passed which repealed the law and amended the state constitution to prevent any agency of the State or of local government from thereafter forbidding racial discrimination in private housing. The State Supreme Court invalidated the amendment and the United States Supreme Court affirmed. The Court rested its decision on alternative grounds. It agreed with the state court's premise that passage of the provision encouraged private racial discrimination impermissibly. It also reasoned that the provision made immune from ordinary legislative process discriminatory racial practices and thus impermissibly burdened minorities in the achievement of legitimate aims in a way other classes of persons were not burdened. With regard to the encouragement to unlawful activity, Justice White observed:

> But the section struck more deeply and more widely. Private discriminations in housing were now not only free from Rumford and Unruh but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter immune from legislative, executive or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources. [311]

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[310] 387 U.S. 369 (1967).

[311] Id. at 377.

In a subsequent case, the Mulkey rationale was utilized in a unanimous decision voiding an Akron ordinance which suspended an "open housing" ordinance and provided that any future ordinance regulating transactions in real property "on the basis of race, color, religion, national origin or ancestry" must be submitted to a vote of the people before it could become effective, while any other ordinance would become effective when passed, except that it could be petitioned to referendum.[312/] Finally, when New York enacted a statute prohibiting the assignment of students or the establishment of school districts for the purpose of achieving racial balance in attendance unless with the express approval of a locally elected school board or with the consent of the parents, a measure designed to restrict the state education commissioner's program to ameliorate *de facto* segregation, a federal court held the statute void, holding in reliance on Mulkey that the statute encouraged racial discrimination and that by treating educational matters involving racial criteria differently from other educational matters it made more difficult a resolution of the *de facto* segregation problem. The Supreme Court affirmed.[313/]

In a line of decisions dealing with efforts by various southern states to use business regulations as a means of harassing or destroying civil rights organizations operating in the South, the Court looked behind the statutory requirements to their probable discriminatory effects. Thus, in NAACP v. Alabama,[314/] Justice Harlan observed that an order requiring the production of the names and addresses of all the Association's members and agents:

[312/] Hunter v. Erikson, 393 U.S. 385 (1969).

[313/] Lee v. Nyquist, 318 F. Supp. 710 (W.D. N.Y. 1970), affirmed, 402 U.S. 935 (1971).

[314/] 357 U.S. 449 (1958).

> must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association. Petitioner has made an uncontroveted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure. [315]

The Court concluded that "Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have." The Court was "unable to perceive that the disclosure [has] a substantial bearing on the purpose advanced by the state, determining whether the organization was complying with the state foreign corporation registration statute."[316] Similarly, in Bates v. Little Rock,[317] the Court could find "no relevant correlation" between the power to impose license taxes and the compelled disclosure of membership lists.[318]

As in Reitman, the Order encourages a denigration of the procedural integrity of the informal rulemaking process by creation of a critical access point to the process which may be utilized in secret by governmental and non-governmental interests to influence indirectly the decision of the ultimate agency decisionmaker. As in the line of membership disclosure cases, the foreseeable consequences of such ex parte communications is to render meaningless participation by the unknowing public; to deprive the agency of the adversarial input that might result from open dispute over rulemaking issues; and to undermine judicial review of agency action for want of a complete record.[319/] The Order in both its breadth of control and absence of safeguards strikes at the heart of established principles of due process that have been fashioned to protect the integrity of the administrative process.

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[315] Id. at 462-463.

[316] Id. at 466.

[317] 361 U.S. 516 (1960)

[318] See also, Shelton v. Tucker, 364 U.S. 479 (1960).

319/ The absence of direct judicial authority on the point is attributable to the totally unprecedented nature and scope of Executive Order 12291. Hitherto Congress has been the source of minimum safeguards through the APA and the Sunshine Act, for example, supplemented by the court's policing of agency action through the process of judicial review.

V. ANALYSIS AND CONCLUSIONS

A. The Framework for Analysis

Actions by one branch of the federal government that raise questions of separation of powers are at once the most challenging and most difficult to resolve. More often than not the touchstones of resolution—the text of the Constitution itself, legal precedents, scholarly commentary—so bright and clear in the abstract, dissolve before the concrete challenge. What guidance we have may be carefully gleaned from a Supreme Court decision in which the Justices, splitting 6-3, condemned a presidential action as without either constitutional or statutory basis. That conclusion was reached in seven opinions covering 132 pages.

The case, Youngstown Sheet and Tube v. Sawyer,[320/] arose during the midst of the Korean War. In order to prevent a major strike in the steel industry President Truman issued an Executive order authorizing the Secretary of Commerce to seize and operate most of the steel mills in the country. The order relied solely on the powers conferred on the President by the Constitution. This was in apparent tacit admission that during debate on the Taft-Hartley Act the Congress had rejected an amendment that would have authorized Executive seizure, in emergency situations, of means of production threatened by labor-management strife. The President twice advised Congress of his action but it took no action. The steel companies successfully secured an injunction against the seizure; a court of appeals stayed the injunction; and the Supreme Court

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[320/] 343 U.S. 579 (1952).

swiftly asserted jurisdiction and held that the President was without authority to seize the mills.

The opinion of the Court was delivered by Justice Black in characteristically blunt terms:

> The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention had been directed from which such a power can fairly be implied....
>
> The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces....
>
> Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President.... The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute....
>
> It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution "in the Government of the United States, or any Department or Office thereof."
>
> The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes of freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand. 321/

Justice Frankfurter joined the Black opinion but found the issue more complex, and deeply involved with our constitutional structure:

> The powers of the President are not as particularized as are those of Congress. But unenumerated powers do not mean undefined powers. The separation of powers built into our Constitution gives essential content to undefined provisions in the frame of our government. 322/

321/ Id. at 585, 587, 588-589.

322/ Id. at 610.

In the end, for Frankfurter, the case turned on the fact that the question of presidential authority to effect seizures under such circumstances had been debated by Congress before it adopted the Taft-Hartley Act, and Congress had refused to grant that authority.

> It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld.
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> * * *
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> It cannot be contended that the President would have had power to issue this order had Congress explicitly negated such authority in formal legislation. Congress has expressed its will to withhold this power from the President as though it had said so in so many words. 323/

Frankfurter concluded by referring to the insight of Justice Brandeis that presidential reliance on motives of governmental efficiency do not carry with them great constitutional weight. Presidential action in the absence of Congressional authority must be tested in the light of the limitations imposed by the separation principle and the gravity of the effect of such action on protected constitutional values.

> A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions.

323/ Id. at 609.

> The price was deemed not too high in view of the safeguards which these restrictions afford. I know no more impressive words on this subject than those of Mr. Justice Brandeis:
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> > "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." Myers v. United States, 272 U.S. 52, 240, 293.
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> [324]

Justice Douglas also joined the Court's opinion. He conceded that executive action under the circumstances would be more efficient than the invocation of "the ponderous machinery" of the legislation.[325] But he also observed that the Constitution commands the use of the less efficient. "The Framers with memories of tyrannies produced by a blending of executive and legislative power rejected the political arrangement."[326] "Today a kindly President uses its seizure power to effect a wage increase and to keep the steel furnaces in production. Yet tomorrow another President might use the same powers to prevent a wage increase, to curb trade unionists, to regiment labor as oppressively as industry thinks it has been regimented by this seizure."[327]

For Justice Jackson the issue was as difficult as it was for Frankfurter. "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress".[328] He then delivered a classic exposition of the scope of executive power under the Constitution:

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[324] Id. at 613-614.

[325] Id. at 629.

[326] Id. at 633.

[327] Id. at 633-634.

[328] Id. at 635.

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, he may be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
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> 2. When the President acts in absence of either a congressional grant or denial or authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
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> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system. [329]

Justice Burton also joined the Black opinion but chose to rely on the fact that Congress had prescribed specific procedures for such emergencies which could not be ignored. [330] Justice Clark joined only in the judgment and also relied on the fact that emergency procedures had been enacted by Congress. But he perceived the possibility of less stringent inhibitions on executive action in emergency situations where Congress has not spoken so clearly:

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[329] *Id*. at 637.

[330] *Id*. at 660.

> I conclude that where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; but that in the absence of such actions by Congress, the President's independent power to act depends upon the gravity of the situation con-fronting the nation. It cannot sustain the seizure in question because here... Congress had prescribed the methods to be followed by the President in meeting the emergency at hand. 331/

While Youngstown does not provide an infallible litmus by which to measure the validity of a particular presidential action, it provides guideposts for reasoned judgment, based upon a number of common grounds, stated and implicit, relied upon by a majority of the Justices. Thus it is clear that the unequivocal manifestation of Congressional intent not to vest emergency seizure power in the President was a critical factor for a majority of the Court. Also, it was not necessary for that intent to be evidenced by a direct positive enactment. A positive rejection of authorization to act was sufficient. Further, this holding strongly implies judicial recognition of Congressional primacy in domestic policymaking, particularly where it has made its wishes known. But it is also clear that in the absence of an evident legislative resolve, a majority would have considered a claim of inherent authority in proper exigent circumstances. Finally, Justice Jackson identified a "twilight" area in which the distribution of power may be uncertain and the resolution of "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than abstract theories of law." 332/ That is, in such situations executive action must be judged in the context of events in which they occur.

331/ Id. at 662.

332/ Id. at 637.

At the core of the analytic exercise, therefore, these questions seem most pertinent: What has the President done and on what legal basis has he done it? Has the Congress manifested its will in this area? If so, in what manner? If Congress has acted contrary to assumed presidential authority, is it in an area in which there are countervailing constitutional prerogatives of the President?

B. The Nature of Regulatory Reform

Understanding what the President has done, however, is not fully accomplished by a simple recitation of the provisions of Executive Order 12291 alone. That Order has immediate as well as more remote historical antecedents which aid in comprehending its essential nature and purpose and thereby placing it in its proper constitutional perspective.

Executive Order 12291 is the latest response to calls for "regulatory reform", a Janus-like notion that most often reveals a procedural face. But the true face of regulatory reform is substantive in nature and rooted in the concern with the distribution of the scarce resources of our society. It therefore speaks to our ever-evolving social, economic, and political values and manner in which the Constitution accommodates the process of change.

The central issue in that evolutionary process has been, since the founding of the nation, the question of where control of resource distribution will rest. Fortunately, the recognized genius of the constitutional order established by the Founding Fathers was the creation of a scheme which anticipated and allowed for shifts in societal values and provided mechanisms to accomplish both simple and complex social and economic accommodations. Thus, when we talk of the "administrative state" we are in fact describing the phenomenon of the shift in the 1930's from a form of laissez faire governance to positive, interventionist government. That turn, impelled by severe economic dislocations, was later reinforced by the exigencies of war and international emergencies, and solidified during a period of economic prosperity and rising social and economic expectations.

The early opposition to this fundamental change in the nature and locus of control over national resource allocation was often couched in terms of procedural safeguards and managerial efficiency. The first modern regulatory reform movement called for hierarchical management control of the new administrative agencies combined with uniform, highly judicialized internal procedures. These proposals were recognized as thinly veiled attempts to impede or thwart effectuation of the substantive programs of the proliferating New Deal agencies[333] and were ultimately rejected in favor of legislatively created procedural mechanisms designed to facilitate effectuation of the new governmental approach.

The transformation of the 1930's was peacefully accomplished through Congressional delegations of hitherto unparalleled authority to an active Executive which received, ultimately, complete judicial blessing. Like other major reorderings of the past, it tested the ability of our constitutional institutions to accommodate to change within the framework of the Constitution's basic commitment to the principles of separation of powers. Also like those changes, the process of adjustment is not one of short duration. While it seems unlikely that the contemporary calls for regulatory reform signal the beginning of a return to anything approaching a regime of laissez faire, it is apparent we are in the midst of an historical moment of doubt and reassessment with respect to the question of the proper role of modern government. But though the current controversy may be seen as part of a fine tuning process, it would be a mistake not to recognize the fact that the ends of today's reformers are no different from their lineal predecessors of the thirties--to affect the substance of government programs. Whether those ends are inappropriately reflected in Executive Order 12291's program is at the heart of the instant issue.

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[333] See note 231-239, *supra*, and accompanying text.

C. Informal Rulemaking Under Executive Order 12291

The Presidential Order is directed solely at informal rulemaking by covered Executive Branch agencies. In terms of scope of coverage, then, it would encompass virtually all substantive agency rulemaking since few rulemakings are required by statute to be conducted in the context of formal record hearings.[334/]

The Order differs in several major respects from any previous legislative or Executive effort to regulate the rulemaking process. For the first time central coordination of the rulemaking process has been placed in an agency (OMB) subject to and controlled by the President and invested with authority to define, direct and enforce the manner in which the process is conducted. Moreover, for the first time, the rule development process of all agencies is subjected to formal procedures. Finally, in another innovation, the development of all rules is subject to a single common standard of assessment--cost effectiveness--which is to be defined by OMB.

Under the Order, the new rulemaking process may be sketched as follows. All proposed rules must be submitted to OMB before publication in the Federal Register. If an agency deems a rule minor, it must be submitted at least ten days prior to publication. However, if within that period the Director determines it to be major, the agency must prepare a preliminary Regulatory

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[334/] 1 Davis, Administrative Law Treatise, sec. 6:1 (2 ed. 1978).

Impact Analysis (RIA) and submit it for review. The criteria for determining whether a rule is major are to be established by the Director. If an agency itself determines the rule in question is major it must be submitted, together with its RIA, at least 60 days before publication. If on review the Director finds that a preliminary RIA is deficient he may order a delay in publication of the proposed rule and RIA and require consultation with him or with other agencies.

Similarly, final RIA's must be prepared and submitted to the Director at least 30 days prior to publication of the rule as final. The Director may order the agency to refrain from publishing a final rule and RIA until he has submitted his comments and the agency has responded. The Order does not impose any time limit on the Director to complete his review and submit comments to either preliminary or final RIA's. OMB's negative comments and the agency response to them must be placed on the public record of the proceeding. However, the Order does not require any other comments or communications between the Director and the agency, or contacts with any interested person, to be placed on the public record of a particular rulemaking proceeding. However, the Director recently issued notice that OMB and the Task Force would advise members of the public who have submitted factual material to them to send such factual material to the proposing agency. Where warranted, OMB and the Task Force will send materials received to the relevant agency on their own, as well as internally developed factual material, which will be placed on the record. Oral communications, and particularly those with the President and and White House staff will not be revealed.[335/]

[335/] See Memorandum of June 11, 1981 from David A. Stockman to Heads of Departments and Agencies, entitled "Certain Communications Pursuant to Executive Order 12291, 'Federal Regulation'. The memo cryptically states that "our procedures will be consistent with the holdings of and policies discussed in Sierra Club v. Costle," an apparent reference to the court's approval in that case of oral contacts between the President and White House staff and agency officials both during and after the public comment period.

The Director's authority also extends to existing rules. He may designate any rule or related set of rules as major and require that it be subjected to cost-benefit review and analysis on a schedule set by him.

The methodology to be utilized in the preparation of the RIA is to be defined by the Director. In addition, he can require an agency to obtain and evaluate in connection with any rule any additional relevant data from any appropriate source.

Finally, the Director may, in his discretion, waive any or all the requirements of the Order. The Director's decisions are subject to review by the Presidential Task Force on Regulatory Relief headed by the Vice President, a body of which he is a member. Final appeal lies with the President.

D. The Legal Justification for the Order

Despite the Order's disavowal of any applicability where it is contrary to law, and its insistence that it "is intended only to improve the internal management of the Federal Government," it may be contended that the Order exceeds the President's independent authority under Article II to "guide and supervise" executive officers in the exercise of their administrative discretion because it in fact displaces such discretion; conflicts with the purpose and design of the Administrative Procedure Act; and fails to provide adequate procedural safeguards to protect the integrity of the rulemaking process. A fair statement of the Executive's case to meet these objections may be summarized as follows.[336]

The President's authority to coordinate the administration and execution of the laws is founded in the Constitution, historical practice, and the common sense practicalities of modern government. Thus, Article II vests in the President the powers of appointment and removal, the power to demand written opinions from subordinate executive officers, and the right to invoke executive privilege to protect consultative privacy, for the purpose of ensuring the President's effective supervision over the Executive Branch. The Supreme Court has confirmed that these powers, together with his constitutional duty to "take Care" that the laws are faithfully executed, make it clear that the President was meant to have the exclusive responsibility to execute the law through agents who are in turn responsible to him. Otherwise the constitutional goals of accountability and efficiency implicit in the creation of a single Executive would be thwarted.

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[336] See supra pp. 29-47 for a full discussion of the argument outlined here.

Congressional practice also makes evident the recognition of the President's central management role. The Chief Executive has been given effective control over agency budgets, legislative proposals, and information gathering from the public, and is not specifically precluded by the Administrative Procedure Act or other law from participating in the informal rulemaking process. Morever, recent legislative efforts to perfect procedural safeguards in rulemaking by prohibiting ex parte contacts and requiring rulemaking on the record have not been extended to informal rulemaking, an indication of acquiescence in the possibility, if not the fact, of presidential intervention in the process.

Further, the practical realities of administrative rulemaking, and modern government generally, demand Executive coordination and supervision. Rulemaking today tangibly touches and effects all aspects of society. Our form of government simply cannot function effectively, efficiently, or rationally if key administrative policymakers are isolated from each other and the President. Only the President with his overall view can provide the unified, coordinated direction necessary to integrate policy administration. Therefore, only the clearest direction of Congress to insulate an officer's discretion will suffice to preclude executive guidance and supervision.

Executive Order 12291 does no more than rationalize management direction over the Executive Branch rulemaking process. The Order does not interfere with the decisional role assigned by Congress to subordinate executive officers since ultimate authority always remains with those officials. Also, formalization of the supervisory structure opens it to public scrutiny more than ever before and focuses responsibility on the President and his principal management agent. With the availability of judicial review, procedural due process rights of participants and the integrity of the rulemaking process are fully preserved and protected.

E. Conclusion

A critical review of the historical and legal development of the Office of the President leads to the conclusion that the modern expansion of presidential power in domestic matters has not been constitutionally impelled.[337] Neither the removal power nor the authorities and duties of Article II are sufficient to support or explain that development. Rather, the explanation lies in the mammoth growth of modern government, a phenomenon solely attributable to the will of the Congress and the need to use the arms of administration to carry out that Congressional will.

Such explanation is not meant either to denigrate the Executive office or ignore the scope of authority that has been legislatively reposed in it. It does, however, speak to the source and nature of executive power. What authority

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[337] See, *supra*, pp. 49-73.

Congress gives the Executive must be scrutinized carefully to determine the exact measure that it is given; for what is withheld is not the President's to wield.

A close examination of Executive Order 12291 raises a serious question whether the purpose and effect of its scheme, taken as a whole, is to establish substantive control over the process of informal rulemaking. That object seems evident in its central focus on cost-benefit analysis. Thus agency action that involves the promulgation of new rules, review of old rules, or the development of legislative proposals concerning regulation may be undertaken only if societal benefits will outweigh the costs of the action.[338/] Operational oversight authority is placed in the Director of OMB who has a formidable array of powers to accomplish that goal. All rules must be reviewed by the Director and he decides which are major based on the definition supplied by the Order and supplemental criteria he is authorized to devise. The proposing agency is then required to prepare a preliminary cost-benefit analysis (RIA) based upon a methodology designed by the Director. The Director may require the agency to obtain and evaluate any additional relevant data from any appropriate source designated by the Director. He may require consultation with other agencies or with himself. He can also direct the agency to refrain from publishing the proposed rule and RIA for an indefinite period. Once the proposal and RIA are allowed to be published and the period for public comment is concluded, a similar review process for a final RIA begins. Publication of the rule in final form again may be delayed indefinitely.

Existing rules are also subject to OMB review. Here the Director may designate a rule or set of rules as major and require that they be subjected

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338/ Executive Order 12291, sec. 2(b).

to cost-benefit analysis, again according to the Director's prescribed methodology. The review must be accomplished within a schedule set by the Director. Although the existing rule review process does not specifically require that cost-ineffective rules be modified or repealed, there would appear no other purpose for the exercise.

Finally, the Director has authority to waive all the requirements of the Order. There is no standard to guide either the exercise of the waiver or deferral authority, nor is there any time limit on the length of any deferral by the Director.

The Order therefore appears to establish a formal, comprehensive, centralized, and substantively oriented system of control of informal rulemaking that is without precedent. While it might be argued that a requirement to utilize cost-benefit principles, standing alone, is procedural, the extra-agency definition of such principles and the requirement that they be applied, supported by an effective enforcement mechanism, appears to belie a simple procedural purpose. The prescription of such principles is concededly substantive [339/] and in the context of the unfettered authority that may be wielded under the Order, the inevitable effect could be the displacement of ultimate agency discretion in contravention of any statute vesting discretionary rulemaking authority in an agency official.

The scheme of the Order arguably would also bring it in direct conflict with the Administrative Procedure Act. [340/] The legislative history of that Act establishes that its dominant purpose was to create a novel form of rulemaking that in its flexibility and informality could be tailored to meet the individualized situations that are encountered by agencies with markedly different missions. The framers of the Act specifically rejected proposals that would

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[339/] See Simms Memo, *supra* note 57 and acccompanying text.

[340/] See, *supra* notes 230-259 and accompanying text.

have imposed government-wide rulemaking procedures that were uniform and highly judicialized. Thus, in section 553 the focus is on the individual agency. There is neither a role for, nor even a mention of, the President in the Act, or its legislative history. The clear intent is to emphasize maximum flexibility and informality free of any extra-agency control in order to bring to bear agency expertise on situations in a fair and expeditious manner. The procedures required are spare and value neutral.

Executive Order 12291 could be said to defeat the intent of the APA by superimposing on section 553 a scheme that establishes a central super-coordinator of unilaterally created uniform, substantively oriented procedures. The Order removes from the hands of the individual agencies not only the method and means of informal rulemaking but, effectively, the statutorily reserved prerogative of an agency to decide whether or not to make a rule. As a consequence, the character of informal rulemaking is irresistably altered. The practice of independent in-house agency rule development prior to public notification could well be substantially displaced and agency freedom to experiment with procedures and methods of self-education before issuance of a final rule may be superfluous. At the very least, both appear subservient to the dominant focus on cost effectiveness analysis.

It may be contended in opposition that since each agency could have adopted cost-benefit assessment itself as part of its decisionmaking process, absent a statutory prohibition on the particular agency, and even voluntarily subjected itself to OMB "guidance and supervision," the fact that it has been established as a result of a presidential initiative should make no difference. In response it may be said that it does, and that it is a difference of constitutional dimensions. In the one case, the agency is exercising its choice pursuant to a statutory authorization. In the other, the Executive is exercising presidential means to effect a presidential purpose in an area in which Congress has spoken. That is the essence of Executive lawmaking and if a court should conclude this is in fact what has occurred, it will be held a violation of the doctrine of separation of powers.

Another concern that may be raised by the design of the Order is the possibility that in funneling all agency rules through one coordinating entity, OMB, a new access or entry point to the decisionmaking process is now available for persons interested in influencing the outcome of a particular rulemaking. Since this Order provides no explicit safeguards to protect the integrity of the process or the interests of the public against secret, undisclosed, and unreviewable contacts,[341] it may be argued that the Order, on its face, deprives participants of essential elements of fair treatment required by due process.[342] In particular, in view of the fact that the President's closest managerial agent is the operational head of this sensitive access point, there may be said to be an invitation to the President and White House aides to make their views known in an effective manner. Similarly, non-governmental interests may attempt to utilize the White House or OMB as a conduit for their views and thereby covertly influence the agency. In such instances there is usually neither knowledge of the contact or what was communicated[343] and thus no opportunity to rebut, nor an appropriate record for court review. In the past the courts have recognized and extended due process protections normally associated with adjudicatory proceedings to rulemaking and other informal executive actions to guard against improper governmental and non-governmental influences in agency policymaking.

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[341] See, *supra* notes 275-283 and accompanying text.

[342] But see Stockman Memorandum, *supra* note 335.

[343] The Freedom of Information Act is of no aid in such situations since the communications are usually oral and thus not discoverable. See 5 U.S.C. 552(a) (1976).

In response, OMB relies upon the recent appeals court decision in Sierra Club v. Costle[344/] which gave blanket approval to "intra-executive contacts" between the President and White House staff both during and after the public comment period.[345/] The court did, however, reserve judgment on the effect on rulemaking of conduit contacts which were not present in the case.[346/]

It may be doubted whether the court's remarks would be dispositive of a dissimilar situation likely to occur under the Order. Costle dealt with a typical situation of a direct but undisclosed contact with a decisionmaker. Under the Order, the likely scenario is a White House contact with the Director who exercises his authority without disclosing the communication or its nature. Indeed, this is present OMB policy.[347/] Further, the failure of the court to make a distinction between White House staff contacts and presidential contacts would appear to be explained by the fact that only one meeting was involved which included both the President and staff. Commentators have generally noted the importance of this distinction.[348/] Finally, the fact the contacts are likely to be made at the rule formulation or drafting stage may be significant. A proposed rule that never sees the light of day because of unknown persuasive efforts at this early stage arguably has at least as much effect on the potentially interested but ignorant segment of the public as a secret contact after the public comment period.

[344/] See, supra note 91.

[345/] Id., slip opinion at 217.

[346/] Id., slip opinion at 213, note 520.

[347/] See Stockman memo, supra note 335.

[348/] See Verkuil, supra note 27 at 981; Bruff, supra note 17 at 505.

It is axiomatic that presidential actions are to be accorded the greatest deference; there can be no presumption of invalidity. But a President's authority can be tested,[349] and the question in such cases may turn, as Justice Jackson suggested in the Steel Seizure Case, "on the imperatives of events and contemporary imponderables".[350] That may be taken to mean that presidential initiatives close to the borderline of his authority may be gauged, in part, by the imperatives of contemporary circumstances, the urgency for executive response. This is not to say that an emergency situation can make lawful action that would otherwise be unlawful. It is, simply, an acknowledgement that actions must be judged within a context. In the present situation, for example, there do not appear to be any "imperatives" or "imponderables" which would weigh judgment conclusively for Executive action, certainly no war or major strike as was present in Youngstown. The linkage has been made between the current inflation and excessive and costly government regulation but no credible claim is made that it has reached the proportions of a national emergency. Nor, as has been indicated, has Congress been quiescent in its attitude toward Executive control of administrative decisionmaking generally or rulemaking in particular.[351]

On the basis of the foregoing review of applicable historical, legal and legislative authorities, it is concluded, first, that Executive Order 12291, in establishing a central coordinating agency for the process of informal rulemaking, and by vesting it with authority to create and enforce substantively oriented procedures designed to direct and control that process, arguably conflicts with the intent of Congress in enacting the Administrative

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[349] See, e.g., Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 637 (1952). United States v. Nixon, 418 U.S. 683 (1974).

[350] Id., 343 U.S. at 637.

[351] See, supra notes 206-229 and accompanying text.

Procedure Act and the scheme of informal rulemaking provided for in section 553 of that Act. There is, therefore, a substantial risk that a court challenge to a rule promulgated pursuant to that Order, or to the Order itself, may succeed on the ground that the President exceeded his authority in issuing the Order.

Second, taking the provisions of Executive Order 12291 as an integral whole, in the context of the stated goals of the Order, and viewing them in the light of the reasonably foreseeable consequences of the Director's exercise of the enforcement mechanisms of the Order, a serious question is raised whether the discretionary authority of agency decisionmakers may be totally displaced in violation of Congressional delegations of rulemaking authority.

Third, it may be argued that the Order, by centralizing authority over informal rulemaking in OMB and requiring it to be the sole clearinghouse for all covered rules, has created a critical access point to the agency decisionmaking process without providing safeguards against secret, undisclosed, and unreviewable contacts by governmental and non-governmental interests seeking to influence the substance of agency action. If so, a court might rule, based upon a body of recent judicial precedent, that the Order's failure to protect the integrity of the policymaking process in the interest of the public from such influences on its face deprives interested persons of their due process rights to a meaningful participation in the decisionmaking process, to a reasoned agency decision based on some kind of record, and the possibility of effective judicial review.

Morton Rosenberg

Morton Rosenberg
Specialist in American Public Law
June 15, 1981

Federal Register
Vol. 46, No. 33
Thursday, February 19, 1981

Presidential Documents

Title 3—

The President

Executive Order 12291 of February 17, 1981

Federal Regulation

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, minimize duplication and conflict of regulations, and insure well-reasoned regulations, it is hereby ordered as follows:

Section 1. *Definitions.* For the purposes of this Order:

(a) "Regulation" or "rule" means an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the procedure or practice requirements of an agency, but does not include:

(1) Administrative actions governed by the provisions of Sections 556 and 557 of Title 5 of the United States Code;

(2) Regulations issued with respect to a military or foreign affairs function of the United States; or

(3) Regulations related to agency organization, management, or personnel.

(b) "Major rule" means any regulation that is likely to result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

(c) "Director" means the Director of the Office of Management and Budget.

(d) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), excluding those agencies specified in 44 U.S.C. 3502(10).

(e) "Task Force" means the Presidential Task Force on Regulatory Relief.

Sec. 2. *General Requirements.* In promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation, all agencies, to the extent permitted by law, shall adhere to the following requirements:

(a) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;

(b) Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society;

(c) Regulatory objectives shall be chosen to maximize the net benefits to society;

(d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; and

(e) Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.

Sec. 3. *Regulatory Impact Analysis and Review.*

(a) In order to implement Section 2 of this Order, each agency shall, in connection with every major rule, prepare, and to the extent permitted by law consider, a Regulatory Impact Analysis. Such Analyses may be combined with any Regulatory Flexibility Analyses performed under 5 U.S.C. 603 and 604.

(b) Each agency shall initially determine whether a rule it intends to propose or to issue is a major rule, *provided that*, the Director, subject to the direction of the Task Force, shall have authority, in accordance with Sections 1(b) and 2 of this Order, to prescribe criteria for making such determinations, to order a rule to be treated as a major rule, and to require any set of related rules to be considered together as a major rule.

(c) Except as provided in Section 8 of this Order, agencies shall prepare Regulatory Impact Analyses of major rules and transmit them, along with all notices of proposed rulemaking and all final rules, to the Director as follows:

(1) If no notice of proposed rulemaking is to be published for a proposed major rule that is not an emergency rule, the agency shall prepare only a final Regulatory Impact Analysis, which shall be transmitted, along with the proposed rule, to the Director at least 60 days prior to the publication of the major rule as a final rule;

(2) With respect to all other major rules, the agency shall prepare a preliminary Regulatory Impact Analysis, which shall be transmitted, along with a notice of proposed rulemaking, to the Director at least 60 days prior to the publication of a notice of proposed rulemaking, and a final Regulatory Impact Analysis, which shall be transmitted along with the final rule at least 30 days prior to the publication of the major rule as a final rule;

(3) For all rules other than major rules, agencies shall submit to the Director, at least 10 days prior to publication, every notice of proposed rulemaking and final rule.

(d) To permit each proposed major rule to be analyzed in light of the requirements stated in Section 2 of this Order, each preliminary and final Regulatory Impact Analysis shall contain the following information:

(1) A description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits;

(2) A description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs;

(3) A determination of the potential net benefits of the rule, including an evaluation of effects that cannot be quantified in monetary terms;

(4) A description of alternative approaches that could substantially achieve the same regulatory goal at lower cost, together with an analysis of this potential benefit and costs and a brief explanation of the legal reasons why such alternatives, if proposed, could not be adopted; and

(5) Unless covered by the description required under paragraph (4) of this subsection, an explanation of any legal reasons why the rule cannot be based on the requirements set forth in Section 2 of this Order.

(e) (1) The Director, subject to the direction of the Task Force, which shall resolve any issues raised under this Order or ensure that they are presented to the President, is authorized to review any preliminary or final Regulatory Impact Analysis, notice of proposed rulemaking, or final rule based on the requirements of this Order.

(2) The Director shall be deemed to have concluded review unless the Director advises an agency to the contrary under subsection (f) of this Section:

(A) Within 60 days of a submission under subsection (c)(1) or a submission of a preliminary Regulatory Impact Analysis or notice of proposed rulemaking under subsection (c)(2);

(B) Within 30 days of the submission of a final Regulatory Impact Analysis and a final rule under subsection (c)(2); and

(C) Within 10 days of the submission of a notice of proposed rulemaking or final rule under subsection (c)(3).

(f) (1) Upon the request of the Director, an agency shall consult with the Director concerning the review of a preliminary Regulatory Impact Analysis or notice of proposed rulemaking under this Order, and shall, subject to Section 8(a)(2) of this Order, refrain from publishing its preliminary Regulatory Impact Analysis or notice of proposed rulemaking until such review is concluded.

(2) Upon receiving notice that the Director intends to submit views with respect to any final Regulatory Impact Analysis or final rule, the agency shall, subject to Section 8(a)(2) of this Order, refrain from publishing its final Regulatory Impact Analysis or final rule until the agency has responded to the Director's views, and incorporated those views and the agency's response in the rulemaking file.

(3) Nothing in this subsection shall be construed as displacing the agencies' responsibilities delegated by law.

(g) For every rule for which an agency publishes a notice of proposed rulemaking, the agency shall include in its notice:

(1) A brief statement setting forth the agency's initial determination whether the proposed rule is a major rule, together with the reasons underlying that determination; and

(2) For each proposed major rule, a brief summary of the agency's preliminary Regulatory Impact Analysis.

(h) Agencies shall make their preliminary and final Regulatory Impact Analyses available to the public.

(i) Agencies shall initiate reviews of currently effective rules in accordance with the purposes of this Order, and perform Regulatory Impact Analyses of currently effective major rules. The Director, subject to the direction of the Task Force, may designate currently effective rules for review in accordance with this Order, and establish schedules for reviews and Analyses under this Order.

Sec. 4. *Regulatory Review.* Before approving any final major rule, each agency shall:

(a) Make a determination that the regulation is clearly within the authority delegated by law and consistent with congressional intent, and include in the **Federal Register** at the time of promulgation a memorandum of law supporting that determination.

(b) Make a determination that the factual conclusions upon which the rule is based have substantial support in the agency record, viewed as a whole, with full attention to public comments in general and the comments of persons directly affected by the rule in particular.

Sec. 5. *Regulatory Agendas.*

(a) Each agency shall publish, in October and April of each year, an agenda of proposed regulations that the agency has issued or expects to issue, and currently effective rules that are under agency review pursuant to this Order. These agendas may be incorporated with the agendas published under 5 U.S.C. 602, and must contain at the minimum:

(1) A summary of the nature of each major rule being considered, the objectives and legal basis for the issuance of the rule, and an approximate

schedule for completing action on any major rule for which the agency has issued a notice of proposed rulemaking;

(2) The name and telephone number of a knowledgeable agency official for each item on the agenda; and

(3) A list of existing regulations to be reviewed under the terms of this Order, and a brief discussion of each such regulation.

(b) The Director, subject to the direction of the Task Force, may, to the extent permitted by law:

(1) Require agencies to provide additional information in an agenda; and

(2) Require publication of the agenda in any form.

Sec. 6. *The Task Force and Office of Management and Budget.*

(a) To the extent permitted by law, the Director shall have authority, subject to the direction of the Task Force, to:

(1) Designate any proposed or existing rule as a major rule in accordance with Section 1(b) of this Order;

(2) Prepare and promulgate uniform standards for the identification of major rules and the development of Regulatory Impact Analyses;

(3) Require an agency to obtain and evaluate, in connection with a regulation, any additional relevant data from any appropriate source;

(4) Waive the requirements of Sections 3, 4, or 7 of this Order with respect to any proposed or existing major rule;

(5) Identify duplicative, overlapping and conflicting rules, existing or proposed, and existing or proposed rules that are inconsistent with the policies underlying statutes governing agencies other than the issuing agency or with the purposes of this Order, and, in each such case, require appropriate interagency consultation to minimize or eliminate such duplication, overlap, or conflict;

(6) Develop procedures for estimating the annual benefits and costs of agency regulations, on both an aggregate and economic or industrial sector basis, for purposes of compiling a regulatory budget;

(7) In consultation with interested agencies, prepare for consideration by the President recommendations for changes in the agencies' statutes; and

(8) Monitor agency compliance with the requirements of this Order and advise the President with respect to such compliance.

(b) The Director, subject to the direction of the Task Force, is authorized to establish procedures for the performance of all functions vested in the Director by this Order. The Director shall take appropriate steps to coordinate the implementation of the analysis, transmittal, review, and clearance provisions of this Order with the authorities and requirements provided for or imposed upon the Director and agencies under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, and the Paperwork Reduction Plan Act of 1980, 44 U.S.C. 3501 *et seq.*

Sec. 7. *Pending Regulations.*

(a) To the extent necessary to permit reconsideration in accordance with this Order, agencies shall, except as provided in Section 8 of this Order, suspend or postpone the effective dates of all major rules that they have promulgated in final form as of the date of this Order, but that have not yet become effective, excluding:

(1) Major rules that cannot legally be postponed or suspended;

(2) Major rules that, for good cause, ought to become effective as final rules without reconsideration. Agencies shall prepare, in accordance with Section 3 of this Order, a final Regulatory Impact Analysis for each major rule that they suspend or postpone.

(b) Agencies shall report to the Director no later than 15 days prior to the effective date of any rule that the agency has promulgated in final form as of the date of this Order, and that has not yet become effective, and that will not be reconsidered under subsection (a) of this Section:

(1) That the rule is excepted from reconsideration under subsection (a), including a brief statement of the legal or other reasons for that determination; or

(2) That the rule is not a major rule.

(c) The Director, subject to the direction of the Task Force, is authorized, to the extent permitted by law, to:

(1) Require reconsideration, in accordance with this Order, of any major rule that an agency has issued in final form as of the date of this Order and that has not become effective; and

(2) Designate a rule that an agency has issued in final form as of the date of this Order and that has not yet become effective as a major rule in accordance with Section 1(b) of this Order.

(d) Agencies may, in accordance with the Administrative Procedure Act and other applicable statutes, permit major rules that they have issued in final form as of the date of this Order, and that have not yet become effective, to take effect as interim rules while they are being reconsidered in accordance with this Order, *provided that*, agencies shall report to the Director, no later than 15 days before any such rule is proposed to take effect as an interim rule, that the rule should appropriately take effect as an interim rule while the rule is under reconsideration.

(e) Except as provided in Section 8 of this Order, agencies shall, to the extent permitted by law, refrain from promulgating as a final rule any proposed major rule that has been published or issued as of the date of this Order until a final Regulatory Impact Analysis, in accordance with Section 3 of this Order, has been prepared for the proposed major rule.

(f) Agencies shall report to the Director, no later than 30 days prior to promulgating as a final rule any proposed rule that the agency has published or issued as of the date of this Order and that has not been considered under the terms of this Order:

(1) That the rule cannot legally be considered in accordance with this Order, together with a brief explanation of the legal reasons barring such consideration; or

(2) That the rule is not a major rule, in which case the agency shall submit to the Director a copy of the proposed rule.

(g) The Director, subject to the direction of the Task Force, is authorized, to the extent permitted by law, to:

(1) Require consideration, in accordance with this Order, of any proposed major rule that the agency has published or issued as of the date of this Order; and

(2) Designate a proposed rule that an agency has published or issued as of the date of this Order, as a major rule in accordance with Section 1(b) of this Order.

(h) The Director shall be deemed to have determined that an agency's report to the Director under subsections (b), (d), or (f) of this Section is consistent with the purposes of this Order, unless the Director advises the agency to the contrary:

(1) Within 15 days of its report, in the case of any report under subsections (b) or (d); or

(2) Within 30 days of its report, in the case of any report under subsection (f).

(i) This Section does not supersede the President's Memorandum of January 29, 1981, entitled "Postponement of Pending Regulations", which shall remain in effect until March 30, 1981.

(j) In complying with this Section, agencies shall comply with all applicable provisions of the Administrative Procedure Act, and with any other procedural requirements made applicable to the agencies by other statutes.

Sec. 8. *Exemptions.*

(a) The procedures prescribed by this Order shall not apply to:

(1) Any regulation that responds to an emergency situation, *provided that*, any such regulation shall be reported to the Director as soon as is practicable, the agency shall publish in the **Federal Register** a statement of the reasons why it is impracticable for the agency to follow the procedures of this Order with respect to such a rule, and the agency shall prepare and transmit as soon as is practicable a Regulatory Impact Analysis of any such major rule; and

(2) Any regulation for which consideration or reconsideration under the terms of this Order would conflict with deadlines imposed by statute or by judicial order, *provided that*, any such regulation shall be reported to the Director together with a brief explanation of the conflict, the agency shall publish in the **Federal Register** a statement of the reasons why it is impracticable for the agency to follow the procedures of this Order with respect to such a rule, and the agency, in consultation with the Director, shall adhere to the requirements of this Order to the extent permitted by statutory or judicial deadlines.

(b) The Director, subject to the direction of the Task Force, may, in accordance with the purposes of this Order, exempt any class or category of regulations from any or all requirements of this Order.

Sec. 9. *Judicial Review.* This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person. The determinations made by agencies under Section 4 of this Order, and any Regulatory Impact Analyses for any rule, shall be made part of the whole record of agency action in connection with the rule.

Sec. 10. *Revocations.* Executive Orders No. 12044, as amended, and No. 12174 are revoked.

Ronald Reagan

THE WHITE HOUSE,
February 17, 1981.

[FR Doc. 81-5780
Filed 2-17-81; 3:19 pm]
Billing code 3195-01-M

United States Department of Justice
Washington, D.C. 20530

SSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

1 3 FEB 1981

MEMORANDUM

Re: Proposed Executive Order entitled "Federal Regulation"

The attached proposed Executive Order was prepared by the Office of Management and Budget in consultation with this Office, and has been forwarded for the consideration of this Department as to form and legality by the Office of Management and Budget with the approval of the Director. The proposed Order is designed to reduce regulatory burdens, to provide for presidential oversight of the administrative process, and to ensure well reasoned regulations. The Order sets forth a number of requirements that Executive Branch agencies must adhere to in exercising their statutory rulemaking authority. We conclude that the Order is acceptable as to form and legality.

The Order has the following major provisions. Agencies must take action only if the potential benefits outweigh the social costs; attempt to maximize social benefits; choose the least costly alternative in selecting among regulatory objectives; and set priorities with the aim of maximizing net benefits. All of these requirements must be followed "to the extent permitted by law." The Order would require agencies to prepare for each "major rule" a Regulatory Impact Analysis (RIA) setting forth a description of the potential costs and benefits of the proposed rule, a determination of its potential net benefits, and a description of alternative approaches that might substantially achieve regulatory goals at a lower cost. Agencies would be required to determine that any proposed regulation is within statutory authority and that the factual conclusions upon which the rule is based are substantially supported by the record viewed as a whole. The Director of the Office of Management and Budget and the Presidential Task Force on Regulatory Relief would be given authority, inter alia, to designate proposed or existing rules as major rules, to prepare uniform standards for measuring costs and benefits, to consult with the agencies concerning preparation of RIA's, to state approval or disapproval of RIA's and rules on the administrative record, to require agencies to respond to these views (and to defer rulemaking while so consulting), and to establish schedules for review and possible revision of existing major rules. The Order would require agencies to defer rules that are pending on the date of its issuance, including rules that have been issued as final rules but are not yet legally effective, and to reconsider them under the Order. By its terms, the Order would create no substantive or procedural rights enforceable by a party against the United States or its representatives, although the RIA would become part of the administrative record for judicial review of final rules.

I. Legal Authority: In general

The President's authority to issue the proposed Executive Order derives from his constitutional power to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3. It is well established that this provision authorizes the President, as head of the Executive Branch, to "supervise and guide" Executive officers in "their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." Myers v. United States, 272 U.S. 52, 135 (1926).1/

The supervisory authority recognized in Myers is based on the distinctive constitutional role of the President. The "take Care" clause charges the President with the function of coordinating the execution of many statutes simultaneously: "Unlike an administrative commission confined to the enforcement of the statute under which it was created . . . the President is a constitutional officer charged with taking care that a 'mass of legislation' be executed," Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 702 (1952) (Vinson, C.J., dissenting).

1/ In Buckley v. Valeo, 424 U.S. 1, 140-41 (1976), the Supreme Court held that any "significant governmental duty exercised pursuant to a public law" must be performed by an "Officer of the United States," appointed by the President or the Head of a Department pursuant to Art. II, § 2, cl. 2. We believe that this holding recognizes the importance of preserving the President's supervisory powers over those exercising statutory duties, subject of course to the power of Congress to confine presidential supervision by appropriate legislation. See also n.7, infra.

Moreover, because the President is the only elected official who has a national constituency, he is uniquely situated to design and execute a uniform method for undertaking regulatory initiatives that responds to the will of the public as a whole.2/ In fulfillment of the President's constitutional responsibility, the proposed Order promotes a coordinated system of regulation, ensuring a measure of uniformity in the interpretation and execution of a number of diverse statutes. If no such guidance were permitted, confusion and inconsistency could result as agencies interpreted open-ended statutes in differing ways.

Nevertheless, it is clear that the President's exercise of supervisory powers must conform to legislation enacted by Congress.3/ In issuing directives to govern the Executive Branch, the President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). It is with these basic precepts in mind that the proposed Order must be approached.

We believe that an inquiry into congressional intent in enacting statutes delegating rulemaking authority will usually support the legality of presidential supervision of rulemaking by Executive Branch agencies. When Congress delegates legislative power to Executive agencies, it is aware that those agencies perform their functions subject to presidential supervision on matters of both substance and procedure. This is not to say that Congress never intends in a specific case to restrict presidential supervision of an Executive agency; but it should not be presumed to have done so whenever it delegates rulemaking power directly to a subordinate Executive official rather than the President. Indeed, after Myers it is unclear to what extent Congress may insulate Executive agencies from presidential supervision. Congress is also aware of the

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2/ See Bruff, Presidential Power and Administrative Rulemaking, 88 Yale L.J. 451, 461-62 (1978).

3/ In certain circumstances, statutes could invade or intrude impermissibly upon the President's "inherent" powers, but that issue does not arise here.

comparative insulation given to the independent regulatory agencies, and it has delegated rulemaking authority to such agencies when it has sought to minimize presidential interference. By contrast, the heads of non-independent agencies hold their positions at the pleasure of the President, who may remove them from office for any reason. It would be anomalous to attribute to Congress an intention to immunize from presidential supervision those who are, by force of Art. II, subject to removal when their performance in exercising their statutory duties displeases the President.

Of course, the fact that the President has both constitutional and implied statutory authority to supervise decisionmaking by Executive Branch agencies does not delimit the extent of permissible supervision. It does suggest, however, that supervision is more readily justified when it does not purport wholly to displace, but only to guide and limit, discretion which Congress has allocated to a particular subordinate official. A wholesale displacement might be held inconsistent with the statute vesting authority in the relevant official. See Myers v. United States, supra, at 135: "Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance." This suggestion is based on the view that Congress may constitutionally conclude that some statutory responsibilities should be carried out by particular officers without the President's revision, because such officers head agencies having the technical expertise and institutional competence that Congress intended the ultimate decisionmaker to possess.4/ Under this analysis, of course, lesser incursions on administrative discretion are easier to support than greater ones. This Office has often taken the position that the President may consult with those having statutory decisionmaking responsibilities, and may require them to consider statutorily relevant

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4/ Cf. H. Friendly, The Federal Administrative Agencies (1962) (discussing concept of "agency expertise" as reason for delegation of power to particular agencies). The Myers Court reaffirmed, however, that even such officers may be dismissed at the pleasure of the President. 272 U.S. at 135.

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matters that he deems appropriate, as long as the President does not divest the officer of ultimate statutory authority.5/ Of course, the President has the authority to inform an appointee that he will be discharged if he fails to base his decisions on policies the President seeks to implement.6/

A. The Order would impose requirements that are both procedural and substantive in nature. Procedurally, it would direct agencies to prepare an RIA assessing the costs and benefits of major rules. We discern no plausible legal objection to this requirement, which like most procedural requisites is at most an indirect constraint on the exercise of statutory discretion. At least as a general rule, the President's authority of "supervis[ion] in his administrative control," *Myers* v. *United States*, *supra*, at 135, permits him to require the agencies to follow procedures that are designed both to promote "unitary and uniform execution of the laws" and to aid the President in carrying out his constitutional duty to propose legislation. See U.S. Const., Art. II, § 3. We believe that a requirement that the agencies perform cost-benefit analysis meets these criteria. Further, the President's constitutional right to consult with officials in the Executive Branch permits him to require them to inform him of the costs and benefits of proposed action.7/ In our view, a requirement that rulemaking authorities prepare an RIA is the least that *Myers* must mean with respect to the President's authority to "supervise and guide" Executive officials.

B. Substantively, the Order would require agencies to exercise their discretion, within statutory limits, in accordance with the principles of cost-benefit analysis. More

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5/ *See generally*, 1 Ops. Office of Legal Counsel Nos. 77-21, 77-56 (1977).

6/ See note 4 *supra*.

7/ *See* U.S. Const., Art. II., § 2 (President may "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices").

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7/ See U.S. Const., Art. II., § 2 (President may "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices").

complex legal questions are raised by this requirement. Some statutes may prohibit agencies from basing a regulatory decision on an assessment of the costs and benefits of the proposed action. *See, e.g., EPA* v. *National Crushed Stone Ass'n*, 101 S. Ct. 295 (1980). The Order, however, expressly recognizes this possibility by requiring agency adherence to principles of cost-benefit analysis only "to the extent permitted by law." The issue is thus whether, when cost-benefit analysis is a statutorily authorized basis for decision, the President may require Executive agencies to be guided by principles of cost-benefit analysis even when an agency, acting without presidential guidance, might choose not to do so. We believe that such a requirement is permissible. First, there can be little doubt that, when a statute does not expressly or implicitly preclude it, an agency may take into account the costs and benefits of proposed action. Such a calculus would simply represent a logical method of assessing whether regulatory action authorized by statute would be desirable and, if so, what form that action should take. In our view, federal courts reviewing such actions would be unlikely to conclude that an assessment of costs and benefits was an impermissible basis for regulatory decisions.

Second, the requirement would not exceed the President's powers of "supervision." It leaves a considerable amount of decisionmaking discretion to the agency. Under the proposed Order, the agency head, and not the President, would be required to calculate potential costs and benefits and to determine whether the benefits justify the costs. The agency would thus retain considerable latitude in determining whether regulatory action is justified and what form such action should take. The limited requirements of the proposed Order should not be regarded as inconsistent with a legislative decision to place the basic authority to implement a statute in a particular agency. Any other conclusion would create a possible collision with constitutional principles, recognized in *Myers*, with respect to the President's authority as head of the Executive Branch.

C. We believe that the President would not exceed any limitations on his authority by authorizing the Task Force and the Director to supervise agency rulemaking as the Order would provide. The Order does not empower the Director or the Task Force to displace the relevant agencies in discharging their statutory functions or in assessing and weighing the costs and benefits of proposed actions.[8] The function of the Task Force and the Director would be supervisory in nature. It would include such tasks as the supplementation of factual data, the development and implementation of uniform systems of methodology, the identification of incorrect statements of fact, and the placement in the administrative record of a statement disapproving agency conclusions that do not appear to conform to the principles expressed in the President's Order. Procedurally, the Director and the Task Force would be authorized to require an agency to defer rulemaking while it responded to their views concerning proposed agency action. This power of consultation would not, however, include authority to reject an agency's ultimate judgment, delegated to it by law, that potential benefits outweigh costs, that priorities under the statute compel a particular course of action, or that adequate information is available to justify regulation. As to these matters, the role of the Director and the Task Force is advisory and consultative. The limited power of supervision embodied in the proposed Order is, therefore, consistent with the President's recognized powers to supervise the Executive Branch without displacing functions placed by law in particular agencies.

8/ The Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812, provides some implied statutory support for the Order by giving OMB a direct role in coordinating agency regulations that impose paperwork burdens on the public. With respect to non-independent agencies the Act gives the Director authority to disapprove "unreasonable" agency collection of information requests. § 3504(h)(5)(C). The Act does not authorize him, however, to disapprove the accompanying rule itself insofar as the two are separable. See § 3518(e); S. Rep. No. 930, 96th Cong., 2d Sess. 56 (1980).

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Jawboning Administrative Agencies: Ex Parte Contacts by the White House*

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Considerable attention has recently focused on the proper role of the President in the coordination of agency policymaking. In this period of staggering inflation, conflicts have arisen between the White House, struggling to implement a uniform policy of regulatory cost cutting, and the agencies, whose strong views about their individual missions foster resistance to budget cuts. These conflicts raise questions about the scope of the President's power to affect administrative outcomes and his ability to intervene behind the scenes during the regulatory process.

The decision arena usually pits White House advisors, whose concern is principally with the economy, against agency officials whose health, safety, and environmental rules inevitably contribute to the inflationary spiral. When these protagonists cannot reach compromises, the President may umpire the event. This intervention is a variation on the long-standing practice of presidential "jawboning."[1] In its current form, however, the focus is not on the inflationary practices of private industries, such as steel, but on the regulatory costs of public entities, such as the Environmental Protection Agency (EPA). In both situations, the President may have the power to act directly, but he prefers for political reasons to cajole, persuade, or arbitrate.

The debate about the appropriateness of this assertion of presidential power inevitably engages the legislative and judicial branches. Congress is concerned with which of the three branches will have primary oversight of administrative policy. Recently, in an effort to regain control of administrative decisionmaking, Congress has adopted the techniques of the legislative veto, sunset laws, and more extensive budgetary review. It is currently debating proposed legislation that would intensify these controls as well as formally expand the President's control over agency policymaking.[2]

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The death of Harold Leventhal was a great shock to all of us in the administrative law field. He was one of that small number of thoughtful judges who dealt with the subject matter in a fresh and challenging way, regularly producing opinions worthy of casebook and treatise immortality. He was also a good friend and an amiable interrogator who relished lively discussion and was never reluctant to seize or reject controversial positions. My guess is that the topic of this Article would in time have produced from him an opinion of characteristic insight and incisiveness. (A hint of how he might have treated this issue appears in his remarks before the Environmental Law Institute Colloquium, see note 109 infra.) It is hard to believe that we will not again have the benefit of the Leventhal view.

[1] "Jawboning" became part of the political lexicon when President Kennedy sought to restrain prices and wages in the steel industry. William Safire notes that President Carter prefers the phrase "moral suasion" to send the same message. See W. Safire, Safire's Political Dictionary 346 (1978). Recently, however, the press characterized President Carter's attack on Mobil Oil Corporation for its failure to make refunds as a "public jawboning campaign." See New Orleans Times-Picayune, Mar. 29, 1980, at 11.

For the judiciary, the question is whether the President and his advisors should be subject to newly unveiled rules on ex parte contacts in informal decisionmaking that have formerly been applied only to private interests. Forceful claims have been made that the agencies should be free of "interference" from all outsiders, including those who work in the executive office buildings.[3] The White House, quite naturally, regards the label "outsider" as a contradiction of its institutional responsibilities, which, by their nature, must be exercised in private.

It would not be surprising if Congress soon brings these matters to a legislative conclusion. It is equally likely that the judicial review questions will be addressed by the courts. It is thus a propitious time to study and evaluate the institutional and constitutional issues that surround the current debate. This Article discusses the constitutional sources of presidential power to control agency policymaking. It also suggests the devices available to Congress to limit White House intervention. The core of the Article analyzes judicial decisions imposing restrictions on ex parte contacts in formal rulemaking and adjudication, and concludes that these restrictions should not automatically be extended to private involvement in informal rulemaking, let alone presidential involvement. Finally, the Article evaluates several proposals for regulating White House contacts and offers its own recommendations.

I. OVERVIEW

A. *The Decisionmaking Context*

The Carter Administration has had confrontations with agency policymakers over health, safety, and environmental rules proposed by executive agencies that White House economic advisors consider more costly than necessary to achieve what they view as a tolerable level of benefits. This White House intervention in the agency decision process has produced dismay among the participants and, in some instances, consternation among the regulators as well. The three rules that have attracted the most attention involved the regulation of cotton dust, ozone levels, and strip mining. The events surrounding the promulgation of these rules provide an illustrative factual predicate for the larger institutional concerns they raise.

1. *Cotton Dust*. In 1978, the Occupational Health and Safety Administration (OSHA) of the Department of Labor promulgated regulations establishing a

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[2] See text accompanying notes 211-29 infra.

[3] See Memorandum by Robert Rauch, Environmental Defense Fund, 1 (Sept. 5, 1978).

permanent health standard limiting exposure to cotton dust.[4] After extensive public comments and the creation of an informal rulemaking record in excess of 100,000 pages,[5] the agency decided that it was "technically and economically feasible" for the industry to reduce exposure to cotton dust by set limits within a four-year implementation period.

During the rulemaking proceeding, but after the close of the public comment period, Charles Schultze, the head of the Council of Economic Advisors (CEA), speaking with the President's concurrence, expressed to Labor Secretary Ray Marshall the Administration's concerns about the inflationary impact of the standards.[6] Marshall objected to this interference,[7] but a compromise was later reached when the President brought both principals together in the Oval Office.[8] When the final rule was announced on June 19, 1978, Secretary Marshall and Chairman Schultze held a joint press conference, where Secretary Marshall attested to the Administration's concern for promulgating regulations that are effective without being inflationary.[9] Although the AFL-CIO challenged the standard in court, it confounded expectations by failing to press objections to the President's role before the District of Columbia Circuit.[10]

2. *Ozone*. The EPA has also come in for its share of external pressure. Under the Clean Air Act, the Agency is required to set national air quality standards for major cities. After consultations with Alfred Kahn of the Council of Wage and Price Stability, Charles Schultze, and White House science advisor Frank Press, the Administrator of the EPA, Douglas Costle, announced a reduction in the standard for ozone levels.[11] Immediately following this action, Costle received directions from the President's economic advisors concerning the issuance of regulations under the Clean Water Act. In a strong clash of views, Costle ultimately wrote Kahn a letter stating why the EPA's toxic effluent control program was proceeding properly.[12] The White House press secretary had perhaps precipitated that exchange by inviting EPA officials who were allegedly

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[4] Standard for Occupational Exposure to Cotton Dust, 43 Fed. Reg. 27,350-99, as amended, id. at 28,473-74, 35,032-35, 56,893-94 (1978) (codified in 29 C.F.R. § 1910.1043 (1979)).

[5] The agency provided 90 days for written comments and held informal hearings in three cities for 14 days. Comments were submitted by 263 persons, and 109 participated in the hearings. See AFL-CIO v. Marshall, 617 F.2d 636, 647 (D.C. Cir. 1979).

[6] See DeMuth, The White House Review Programs, 4 Regulation 13, 19 (Jan./Feb. 1980).

[7] On May 24, 1978, Secretary Marshall wrote to the President objecting to interference by the CEA and the Council on Wage and Price Stability, 6 Occupational Safety & Health Rep. (BNA) 54 (1978).

[8] On June 7, 1978, the Secretary and Eula Bingham met with President Carter, U.S. Dep't of Labor, News Release, June 8, 1978. See Clark, When the President Tries to Regulate, Nat'l L.J., Dec. 16, 1978, at 2029; U.S. Dep't of Labor, News Release, June 19, 1978, at 2.

[9] Id.

[10] The court of appeals substantially upheld the rule against a variety of industry challenges. AFL-CIO v. Marshall, 617 F.2d 636 (D.C. Cir. 1979).

[11] Originally set at .08 parts per million, the final standard announced on Jan. 20, 1979, was .12 parts per million. The practical effect of the rule was to judge as "clean" the smog levels of 10 to 20 cities that would have had to reduce pollution under the old standard. Wash. Post, Jan. 21, 1979, at A1.

[12] Letter from Douglas Costle to Alfred Kahn, Feb. 23, 1979, reprinted in Legal Times of Wash., Mar. 5, 1979, at 23-24.

dissatisfied with Administration involvement to resign.[13] At this point strong criticism about White House interference was heard from Senator Edmund Muskie.[14] Congress became involved in other ways, too, characteristically speaking with several voices. According to reports, Costle was subjected to "hard-ball arm-twisting" from coal-state senators to relax the EPA air pollution rules for coal power.[15] This suggests that presidential interference in agency policymaking is not the only issue; Congress also finds intervention to be a necessary technique, either directly or by use of the White House as a surrogate intervenor. The ozone regulations are now being appealed, and the issue of White House staff intervention is before the District of Columbia Circuit.[16]

3. *Strip Mining*. In another controversial case, the Secretary of the Interior, through the Office of Surface Mining Reclamation and Enforcement (OSM), promulgated permanent rules regulating surface mining.[17] The OSM had initially proposed stringent rules after a notice and comment rulemaking proceeding. During the comment period, the Council of Economic Advisors submitted comments concerning the inflationary impact of the rules.[18] Thereafter, the Council continued to meet with representatives of the Department before the rules were announced by the Secretary. During this postcomment period the OSM announced that it was reopening the administrative record to permit inclusion of all oral and written comments between the Council and outside parties.[19] The purpose of the notice was to assure the public that the Council would comply with the strictures against ex parte contacts that the agency imposed on itself and would not become a "conduit" for private comments. Public interest participants sought to enjoin this process, but relief was denied in *Natural Resources Defense Council v. Schultze*.[20]

After the closed meetings between the Council and the Department and the issuance of the regulations, the public interest plaintiffs sought to discover what discussions had taken place and what documents had been introduced.[21] The court denied the motion for discovery, but it did order the Council to produce any documents obtained from outsiders that had not been included in the record.[22] After the final rules were promulgated,[23] plaintiffs sought judicial review in the district court on the ground that the Council's involvement tainted the postcomment decision process, rendering the resulting rule arbitrary and capricious. The plaintiffs did not make the bold assertion that any involvement by the CEA in the postcomment decision process was forbidden, but only that the Council was disqualified from participating in this particular case because it had not properly purged the influence of postcomment contacts with private parties.[24]

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[13] See Wash. Post, Feb. 23, 1979, at A14. The headline read: "If you don't like it, get out, White House tells EPA staff."

[14] Wash. Post, Feb. 27, 1979, at A2.

[15] Wash. Post, May 5, 1979, at A1. Among the tactics employed was a letter from coal-state senators to President Carter requesting his intervention on behalf of the coal industry.

[16] American Petroleum Inst. v. Costle, No. 79-1104 (D.C. Cir., filed Nov. 9, 1979). See also American Petroleum Inst. v. Costle, 609 F.2d 20 (D.C. Cir. 1979) (per curiam) (related case).

[17] 43 Fed. Reg. 29,012 (1978).

[18] See Department of Justice Memorandum on Legality of "Ex Parte" Contacts, Jan. 19, 1979, reprinted in Legal Times of Wash., Jan. 29, 1979, at 32-33.

[19] 44 Fed. Reg. 1355 (1979).

[20] 12 Envir. Rep. (BNA) 1737 (D.D.C. 1979). The injunction was denied for lack of a showing of irreparable harm.

[21] In re Permanent Surface Mining Regulation Litigation, 13 Envir. Rep. (BNA) 1586 (D.D.C. 1979).

[22] The purpose of the limited discovery was to "ensure that the record is complete" for judicial review. In re Permanent Surface Mining Regulation Litigation, 13 Envir. Rep. (BNA) 1586, 1597 (D.D.C. 1979).

[23] 44 Fed. Reg. 14,902 (1979) (final version codified at 30 C.F.R. ch. 7 (1979)).

These three situations offer different levels of White House involvement. The top level—direct involvement by the President with cabinet-level officers—was seen in the cotton dust rulemaking. In that proceeding and in the ozone rulemaking, there was also a second level of involvement, between top White House policy advisors and top agency officials. In the strip mining proceedings, the principal contacts were between the aides and assistants of each of the officials involved. This level of contacts, although occurring most frequently, arguably bears a heavier burden of justification since it is more removed from direct presidential control. In order to assess the proper scope of presidential involvement in agency policymaking, it is important first to emphasize why the President does intervene, and second, to record the valid public concerns such activity produces.

B. *The Accountability Problem*

President Carter was hardly embarking on a new undertaking as he tried to make the administrative process more responsive to the executive branch, which, in turn, is accountable to the electorate. What stands out is the notable lack of success of previous administrations in controlling policymaking by administrative agencies. By their nature and organization independent agencies have long resisted policy control by the President.[25] In recent years even the executive agencies, which have reason to be instinctively loyal to the President, have been subjected to executive accountability efforts.[26] The task facing President Carter was more awesome than in the past, however. In the 1970's, when Congress created a maze of new environmental, health, and safety standards, placing complicated responsibilities upon new and existing agencies, it created presidential accountability problems of an order of magnitude different from those faced in earlier times.[27]

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[24] The more extreme position—that all White House involvement with the agency is forbidden after the comment period—has been advocated by the Environmental Defense Fund, see Rauch Memorandum, supra note 3, at 39-40, and will undoubtedly be argued to the courts in some future rulemaking.

[25] During the Roosevelt Administration the independent agencies were labelled a "headless fourth branch of government" by the Brownlow Committee. The solution suggested was to remove "nonjudicial" functions from the independent agencies and place them under executive agency control. A similar kind of reform was advocated by the Ash Council during the Nixon Administration. The President's Advisory Council on Executive Organization, A New Regulatory Framework 13-17 (1971). The solution there recommended was replacing collegial commissions with single administrators, who presumably would be more accountable. See generally J. Freedman, Crisis and Legitimacy—The Administrative Process and American Government 8-9 (1978).

The problem of the accountability of collegial bodies arises in regard not only to their relationship to the executive branch, but also to their ability to discharge their statutory missions. This aspect of the problem was emphasized recently in connection with the Nuclear Regulatory Commission's failure to respond effectively to the Three Mile Island accident. Both the Kemeny Commission, appointed by President Carter, and the Rogovin investigation, sponsored by the NRC, recommended a reorganization from a commission format to a single chief executive in order to achieve effective management. See N.Y. Times, Jan. 25, 1980, at A13. See also note 116 infra.

[26] Efforts include the Nixon Administration's controversial "quality of life" review, under which the executive Office of Management and Budget (OMB) passed on environmental regulations.

The Carter Administration attempted to coordinate agency policymaking in a variety of ways. The President issued Executive Order 12,044,[28] requiring each agency to establish a semiannual agenda of significant regulations under development; to expand upon traditional procedural requirements for rulemaking;[29] and to identify and carefully evaluate the need for "significant regulations," including less costly alternative approaches.[30] "Major rules," defined as those having an impact upon the economy of $100 million or more, are to be subjected to a "regulatory analysis" that contemplates a careful study of alternatives and their relative cost effectiveness. The latter requirement is reminiscent of the Ford Administration's "inflation impact statement,"[31] but it does not reflect a total commitment to cost-benefit analysis.

The Carter Administration also established an interagency organization called the Regulatory Council.[32] The role of the Council is twofold. Its first task is to collect agency information about major pending and proposed rules and publish it semiannually in the Regulatory Calendar.[33] Its second, more substan-

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and the "inflation impact statement" required of executive agencies during the Ford presidency. See J. Quarles, Cleaning Up America 117-42 (1976); Exec. Order No. 11,821, 3 C.F.R. § 203 (1974), reprinted in 12 U.S.C. § 1904 (1976).

[27] To take but one example, the Council on Environmental Quality estimates that the cost of complying with environmental regulations will grow from $19 billion to $52 billion (in 1977 dollars) by 1986. See C. Schultze, Testimony on H.R. 3263 before the House Judiciary Committee, at 4 (Nov. 7, 1979).

[28] 43 Fed. Reg. 12,661 (1978), codified in 3 C.F.R. 152 (1979). The order was first published in draft form for public comment. 42 Fed. Reg. 59,740 (1977). During this period the President asked whether the order should be extended to the independent agencies. After receiving adverse comments, the President ultimately exempted independent agencies from mandatory compliance with the order to avoid a "confrontation with Congress." 43 Fed. Reg. 12,670 (1978). At least one respected scholar has indicated that the President has the constitutional power to extend the procedural requirements of the order to independent agencies. See Bruff, Presidential Power and Administrative Rulemaking, 88 Yale L.J. 451, 498-99 (1979).

[29] The order enhances public participation in the rulemaking process by requiring advance notice of proposed rules, a 60-day comment period, and open conferences and public hearings.

[30] Significant regulations are to be determined by their impact upon those regulated and by their "direct and indirect effects . . . including the effect upon competition." Exec. Order No. 12,044, § 2(e), codified in 3 C.F.R. 153 (1979).

[31] See note 26 supra.

[32] The Regulatory Council consists of the heads of all executive departments and agencies and those independent agency heads who desire to participate on a voluntary basis.

[33] The second Regulatory Calendar, issued on Nov. 28, 1979, described 130 rules. It is a measure of how "unaccountable" regulatory policymaking had been that before this calendar was published no one was able to tell the President how many rules were promulgated annually. Conversation with Richard Neustadt, White House staff member (November 1979). It is remarkable that the agencies themselves never thought it in their interest to collect such information.

The Regulatory Council now estimates that the number of rules promulgated annually is in excess of 7,000. R. Neustadt, Regulatory Reform—The President's Program 1 (1979). This report estimates that there are about 2,000 rules each year with significant impact, as defined in note 30 supra, and more than 100 with major economic effects, see text accompanying note 31 supra.

tive, task is to serve as a prescreening body for proposed rules, allowing agencies to coordinate rulemaking to avoid duplication of effort or contradictions of policy.[34] The Council is currently studying regulations with multiple agency impact that affect the coal, steel, automobile, and housing/home financing industries.[35]

Another rulemaking review organization, established by the Administration in 1977, is the Regulatory Analysis Review Group (RARG), composed of representatives from all economic and regulatory agencies and chaired by the Council of Economic Advisors. The function of RARG is to scrutinize the regulatory analyses of fifteen to twenty proposed major rules each year and file a public report in the relevant rulemaking record during the comment period.

Between the prerulemaking functions of the Regulatory Council and the analysis and commentary function of RARG, the Carter Administration created coordinating bodies that achieve results similar to those attained by the OMB "quality of life" review used in the Nixon and Ford Administrations, but without the same political costs.[36] The Carter Administration solutions are dominated by the agencies rather than OMB, and the critical analyses are offered for public comment. Thus, much of the concern over secret White House policymaking is reduced. But even with these policy coordination techniques, the present Administration still believes that continuing off-the-record White House involvement in the rulemaking process is crucial.[37]

C. *The Public Concerns*

No one quarrels with the need of the President and his advisors to coordinate policymaking by administrative agencies. Rising inflation has made this need all the more pressing, because the cost of government social regulations enters directly into the wage- and price-setting mechanisms of the economy. Coordination efforts that increase the efficiency of these regulations will conserve resources for other uses and reduce inflationary pressures.[38] Viewed from this perspective, participation by the President directly or through expert economic advisors promotes regulatory efficiency.[39]

Nevertheless, there are valid public concerns about how and to what extent the White House should shape regulatory policy. Highly charged White House intervention poses a danger of frustrating the will of Congress as expressed in legislation establishing an agency and defining its mission.[40] The danger is not that express mandates precluding or compelling consideration of economic efficiency will be compromised.[41] The problem is more subtle. White House efficiency experts may have an unwelcome effect upon administrators who implement legislation that has a primary focus on social benefit but is silent about balancing other economic interests. To what extent does Congress have a right to expect agency decisionmakers to be "singleminded" in their fidelity to the announced objectives of the legislative scheme? Will responsible bureaucrats retain their regulatory independence when they receive vigorous pressure from White House advisors with a laudable, but not congressionally emphasized, mission?

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[34] One example was the successful coordination among five agencies that regulate carcinogens resulting in the uniform cancer regulatory policy announced in September 1979.

[35] See R. Neustadt, supra note 33, at 4.

[36] "Quality of life" review by OMB during the Nixon administration was blamed for undermining many environmental regulations. See Office of Management and Budget Plans Critical Part in Environmental Policymaking, Faces Little External Review, 7 Envir. Rep. (BNA) 693 (1976).

[37] R. Neustadt, supra note 33, at 15.

[38] See C. Schultze, Testimony, supra note 27, at 5-6.

[39] The CEA's economists are acknowledged to be among the most capable in government service. Thus, a case for White House oversight can be made simply in terms of effective use of talent.

Related to this concern is the fear that strong policymaking from within the White House will reduce incentives for regulators to act responsibly, which will in turn ultimately reduce the quality of administrative appointments.[42] Moreover, some believe that intervention by White House policymakers may not produce better policy, simply because White House staff members are not necessarily better policymakers than agency personnel.[43]

Finally, separation of powers concerns, as they relate to the integrity of government, are implicated when White House actions reflect the interests of private industry in emphasizing a cost-minimization regulatory policy. Powerful private lobbies, increasingly frustrated in obtaining preferential access to administrators, can be expected to use White House political advisors to achieve equivalent clout.[44] The expressed fear is that government regulation will be co-opted by private groups through the intercession of the White House.

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[40] 40. These concerns were expressed vigorously by Senator Muskie during the White House negotiations with EPA over the ozone regulations. See note 14 and accompanying text supra.

[41] 41. If Congress can make its intent absolutely clear, the agencies and the White House are bound to respect it. For example, the Delaney clause, 21 U.S.C. § 348(c)(3)(A) (1976), establishes a per se rule prohibiting all food additives that induce cancer when ingested by man or animal. Thus, even a trace of cancer in a laboratory animal that has been fed saccharin has triggered the ban. See generally P. Verkuil & D. Boies, Public Control of Business 725-27 (1977); Comment, Implementing the Anticancer Clauses of the Food, Drug and Cosmetic Act, 44 U. Chi. L. Rev. 817 (1977). The Endangered Species Act of 1973, 16 U.S.C. § 1536 (1976), is another example. The Supreme Court interpreted it as placing an "incalculable value" upon endangered species, and thus did the snaildarter halt the Tellico dam. See Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978). Another telling example of the effect of congressional specificity is the Clean Air Act, 42 U.S.C. § 1857 (1976), which contains no requirement of economic or technological feasibility and therefore precludes the judicial imposition of cost-benefit analysis. See Union Elec. Co. v. EPA, 427 U.S. 246 (1976).

Similarly, if Congress establishes a statutory scheme that mandates consideration of economic efficiency, neither the White House nor the implementing agency is free to ignore the relevance of cost-benefit calculations. An example is the recent struggle by the courts with the cost-benefit requirements for regulating toxic substances imposed in the Occupational Safety and Health Act, 29 U.S.C. § 655(b)(5) (1976). See American Petroleum Inst. v. Occupational Safety & Health Admin., 581 F.2d 493 (5th Cir. 1978), aff'd sub nom. Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 48 U.S.L.W. 5022 (1980).

[42] 42. For these reasons, Judge Friendly, in his influential 1962 Holmes Lecture, reacted negatively to a suggestion that the White House issue "policy guides" to the FCC. H. Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards 153 (1962). Judge Friendly was commenting upon a proposal made in Redford, The President and the Regulatory Commissions (Nov. 17, 1960) (unprinted report on file at the Bureau of the Budget). See generally Byse, Comments on a Structural Reform Proposal: Presidential Directives to Independent Agencies, 29 Ad. L. Rev. 157, 158-60 (1977).

[43] 43. H. Friendly, supra note 42, at 153-54.

A classic instance of this tendency occurred during the Nixon Administration in the initial days of the EPA. John Quarles, the first chief legal officer of EPA, was summoned by White House assistant Peter Flanigan to explain a court action EPA was bringing against polluters in Galveston Bay.[45] Flanigan first instructed Quarles to distribute to EPA officials a statement by President Nixon that American industry not be made "the whipping boy" of environmentalists.[46] Flanigan then read a letter to the President from one of the targets of EPA's case, complaining angrily about the adverse effect the EPA order would have on his plant's operation. Before long the White House had involved itself directly in the EPA's litigation strategy. Quite understandably, this precipitated a strong congressional reaction against both the White House and the EPA.[47]

Institutional concerns of the judiciary are also implicated by White House intervention. What should the role of the courts be when reviewing administrative rulemaking that has been subjected to White House oversight? Agency policymaking usually occurs after informal rulemaking proceedings, which are subject to procedural requirements and judicial review.[48] Reviewing courts are increasingly expressing the view that they can fulfill their institutional role only if they know the basis for the agency decision.[49] This desideratum has led the courts on review to peruse a "record" of information, comments, and contacts that occurred during the rulemaking process.[50] By extension of this reasoning, White House contacts and comments may be subject to "record" treatment as well.

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[44] William T. Coleman, a former Secretary of Transportation, has recently characterized this danger in strong language:

> Even more 'ominous' is the so-called White House political advisor, whose role is never clearly defined in public but whose bias may simply be the position that will most ensure reelection of the President. His advice will be tailored to achieve the support of a particular constituency at a time when politically desirable or to enhance the President's appeal in a region of the country. Such an advisor—immune from public scrutiny and congressional accountability, free from the constraints of agency decision-making processes, and removed from the advice of experts in the bureaucracy—is not in a position to make a meaningful balancing choice among competing national goals.

ABA Commission on Law and The Economy, Federal Regulation: Roads to Reform 157 (1979). Mr. Coleman dissented from a recommendation of the ABA Commission that the President have the power, subject to procedural constraints, to override the policy decisions of regulatory agencies. This proposal is discussed at notes 208 & 211-22 and accompanying text infra.

Judge Friendly, despite his original fears, which were similar to those of Mr. Coleman, see note 42 supra, changed his position and supported the recommendation, arguing that "[s]omeone in Government, and in the short run that someone can only be the President, must have power to make the agencies work together rather than push their own special concerns to the point that the country becomes ungovernable." Id. at 163.

[45] The story is well told in J. Quarles, supra note 26, at 60-69. EPA had brought suit in Houston against the ARMCO Steel Company. Id. at 61.

[46] Id. at 63.

[47] In a House oversight hearing Representative Reuss suggested to EPA witness Quarles that Flanigan's involvement in EPA litigation was "akin to a 'fix.' " Id. at 74.

[48] See 5 U.S.C. §§ 553, 706 (1976).

[49] See, e.g., Ethyl Corp. v. EPA, 541 F.2d 1, 33-37 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976). See generally Pedersen, Formal Records and Informal Rulemaking, 85 Yale L.J. 38 (1975).

These institutional apprehensions, which arise from the pattern of checks and balances that informs our constitutional system, cannot be lightly dismissed, but they must be viewed against the necessity of coordinated policymaking and accountable officials in an increasingly complex system of government regulation. Each of the public concerns postulates a distrust of government that has a basis in fact but may be excessive as it relates to policy control by the White House. In the co-optation situation, for example, the assumption is that White House advisors are or will become conduits for private viewpoints. If they do, as in the Quarles-Flanigan incident, executive "interference" in ongoing agency adjudication can be ferreted out. But there may be other situations in which White House involvement actually contributes to sound policymaking in agencies where some private interests have already achieved control of decisionmakers. The courts will still need to distinguish the different interests at stake when contacts are not privately inspired but are generated by contacts within government itself. Ultimately the question is whether or not the White House is to be part of the agency decision process. And if it is, what are the limits of appropriate involvement? These questions can be answered only after examining the President's executive power under the Constitution.

II. The Presidential Power to Control Agency Policymaking

Article II of the Constitution admonishes the President to "take Care that the Laws be faithfully executed"[51] and gives him the power to supervise his subordinates by requiring "the Opinion, in writing, of the principal Officer in each of the executive Departments."[52] He is assured of some control over policy through the ability to appoint "Officers of the United States,"[53] a category that includes cabinet officers and related high officials. The important message to be gleaned from these provisions is that the executive power is not shared—it is all placed in the President. The idea of a "plural executive," or a President with a council of state, was considered but rejected by the Constitutional Convention.[54] The Convention chose to risk the potential for tyranny inherent in placing power in one person to gain the advantage of accountability fixed on a single source.[55] Accountability is a crucial aspect of the executive power as expressed in article II.

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[50] It has also come to mean that the procedures of informal rulemaking—notice, comment, and statement of reasons—will be enforced as if they were being applied in an adjudicative context. See Stewart, The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act, 62 Iowa L. Rev. 713, 729-33 (1977).

[51] U.S. Const. art. II, § 3.

[52] Id. § 2, cl. 1.

[53] Id. § 2, cl. 2. In Buckley v. Valeo, 424 U.S. 1, 125-26 (1976) the Court concluded that any appointee exercising "significant authority" pursuant to federal law was an "officer of the United States."

[54] See A. Schlesinger, The Imperial Presidency 382-86 (1973).

The general grants of executive power in article II are, however, inadequate to answer the more specific question of the scope of the President's authority over those of his subordinates who make administrative policy. To resolve this question, the inquiry must focus on the President's removal power, a subject not treated explicitly in the Constitution, and on the inherent power to control subordinates implied by the executive responsibilities contained in article II. Finally, consideration must be given to the President's need to control his subordinates in private, through the application of executive privilege.

A. *The Power to Remove*

The President's power to control policy begins with his appointment of those subordinates who formulate policy in the first instance, since the appointment and confirmation process is the best method for achieving policy coordination. Not all appointments work out, however, and thus the power to remove may be equally necessary to achieve desired results. The classic "removal" cases that form the basis for constitutional analysis need only be briefly reviewed here for the light they shed on the President's inherent power to control policymaking by agencies.[56]

In *Myers v. United States*,[57] the Supreme Court held that an attempted congressional limitation upon the President's power to remove an executive official was unconstitutional, thus assuring President Wilson absolute power to remove a postmaster.[58] Finding the power to remove subordinates to be inherent in the executive function,[59] the Court indicated that the principal qualification on this power related to those who exercise "duties of a quasi-judicial character."[60] *Humphrey's Executor v. United States*[61] presented the question whether President Roosevelt could remove an FTC commissioner (a nonexecutive officer) without complying with a statutory for-cause requirement. The Court answered in the negative, again highlighting the quasi-judicial responsibilities of the official involved.[62] *Humphrey's Executor* also modified the broad dicta of *Myers* by conceding congressional control over subordinates in the "independent" agencies.[63] In *Weiner v. United States*,[64] the Court reemphasized the significance of quasi-judicial duties in preventing President Eisenhower from removing without cause a member of the War Claims Commission, even though Congress had not imposed any restrictions on removal.[65]

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[55] As Professor Schlesinger states: "In the case of high crimes and misdemeanors, who, to put it bluntly, was to be impeached?" Id. at 386.

[56] Professor Harold Bruff has recently done an excellent job of analyzing the removal cases. See Bruff, supra note 28, at 475-83. See also The Constitution of the United States of America—Analysis and Interpretation, 82d Cong., 2d Sess. 457-81 (E. Corwin ed. 1953).

[57] 272 U.S. 52 (1926).

[58] Congress had provided by statute that postmasters were to have four-year terms and could be removed by the President only with the Senate's advice and consent. Id. at 107.

[59] Id. at 117.

[60] Id. at 135.

[61] 295 U.S. 602 (1935).

[62] The Court feared that a failure to respect congressional restrictions on the removal of FTC commissioners could lead to similar nonstatutory removals of ICC commissioners and even court of claims judges. Id. at 629.

Under the limits established in these cases, the commissioners of independent agencies, which traditionally engaged in adjudication, are most likely to be secure from presidential removal without cause. This protection, however, is not so clear-cut today, due to the expanding policymaking roles of agencies such as the FTC.[66] If Congress continues to authorize independent agencies to make important policy decisions, it has to affect their traditional independence from executive control. Commissioners of adjudicative agencies who also formulate policy through rulemaking are increasingly placed in the awkward position of having to be neutral in any adjudications that result from the application of this policy. If one is willing to accept the proposition that a commissioner can be "less unbiased" in rulemaking matters than in adjudications,[67] it is not difficult to foresee a revival of the movement to limit independent agencies to an adjudicative role or to replace them with other bodies less likely to be compromised by a duality of roles.[68]

As these agencies devote more resources to promulgating rules, future Presidents may want to control their rulemaking practices while conceding congressional primacy in the area of adjudication.[69] The manner in which Presidents will be able to exercise control may be limited, however. For example, it is doubtful whether *Humphrey's Executor* can be construed to permit removal of FTC commissioners for poor policymaking.[70] So long as Congress has vested policymaking and adjudicative authority in the same personality, it would be difficult to determine whether the President was exercising his removal power because of policymaking failures or because of adjudicative lapses. Moreover, because rulemaking is more akin to legislating than to executing the laws, the case for congressional control over the tenure of commissioners who function both as policymakers and adjudicators remains strong.[71]

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[63] The designation of an agency as "independent" usually flows from the presence of statutory characteristics such as a for-cause removal restriction and a collegial commission-type organization. For a listing of agencies that the Carter administration considers independent, see 44 Fed. Reg. 11,389 (1979).

[64] 357 U.S. 349 (1958).

[65] Id. at 354-56. This holding presumably extends to the statutes governing other independent agencies such as the FCC, the SEC, and the Federal Energy Regulatory Commission, where Congress has not mentioned removal.

[66] When Humphrey was a commissioner, the FTC was a purely adjudicatory agency. Until 1964, the agency took the position that it did not possess substantive rulemaking power. See National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 693-94 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974). Today, however, the FTC devotes a large share of its resources to making policy through the promulgation of rules. 15 U.S.C. § 57a (1976).

[67] See Association of Nat'l Advertisers, Inc. v. FTC, No. 79-1117 (D.C. Cir. Dec. 27, 1979), cert. denied, 100 S. Ct. 3011 (1980) (reversing the disqualification of FTC chairman Pertschuk in the rulemaking for advertising during children's television shows).

[68] This trend could lead to revived proposals for an administrative court, an idea that has never gained much support from Congress or the bar. See discussion at note 25 supra.

[69] Congress has recently been dealing harshly with the FTC over its rulemaking practices. See generally Gellhorn, The Wages of Zealotry: The FTC Under Siege, 4 Regulation 33 (Jan./Feb. 1980).

[70] Congress granted the FTC substantive rulemaking power in 1975, but it did not amend the removal power. Hence it could be argued that the for-cause limitation was to apply to rulemaking as well as adjudication.

This does not mean that the President's removal power over independent commissioners is nonexistent. In the first place, *Humphrey's Executor* stands virtually alone as a precedent limiting presidential power.[72] Secondly, it should not be overlooked that the President's power to remove for cause is itself a significant tool of executive control whose contours have not been identified, simply because no President has yet tried to remove independent commissioners in this fashion. Undoubtedly, however, the threat to do so remains a potent method of achieving resignations from unwanted commissioners. In addition, it is not clear what kind of hearing and what burden of proof would be required to establish cause in the particular case.[73] Furthermore, one might speculate that Presidents have in the past and will in the future require resignations signed in advance before they appoint people to independent commissions.[74] By this method a President could circumvent any for-cause removal problem that might arise at a later time.

Moreover, some statutes establishing independent agencies authorize the President to appoint the chairman and place no restrictions on his power to remove that person as chairman.[75] This power is limited in that all the President can do is return the particular chairman to the status of commissioner until his or her term expires.[76] Despite this limitation, the power suggests an ability to control agency policy by the use of removal or by the threat of it. This is one of the few techniques available to the President for increasing the accountability of independent agencies that does not brook confrontation with Congress.

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[71] Whatever the constitutional power may suggest, it is unlikely as a political matter that a President would want to challenge the long-held assumption that independent commissioners are secure from removal. Professor Cary considers it politically untenable that Congress would permit the President to make commissions subordinate to executive departments. W. Cary, Politics and the Regulatory Agencies 20 (1967).

[72] In Morgan v. Tennessee Valley Auth., 28 F. Supp. 732, 737 (E.D. Tenn. 1939), aff'd, 115 F.2d 990 (6th Cir. 1940), cert. denied, 312 U.S. 701 (1941), the district court approved President Roosevelt's removal of a member of the TVA and the Sixth Circuit affirmed. Despite the presence of a statutory removal scheme, and despite the recent decision in *Humphrey's Executor*, the court identified as incidental to the appointment power an executive power to remove that could be circumscribed only by precise and unmistakably clear legislative action. In Lewis v. Carter, 436 F. Supp. 958 (D.D.C. 1977), the district court denied a preliminary injunction sought by an EEOC commissioner against his removal, although it acknowledged that *Humphrey's Executor* might impose some restraints upon removal. Also, it must not be forgotten that both *Humphrey's Executor* and *Wiener* were cases seeking lost salary, rather than reinstatement. See L. Tribe, American Constitutional Law 189 (1978) (the power to reinstate should be available if needed).

[73] There would also have to be substantive tests devised to determine whether the vague standards constituting "cause" for removal—"inefficiency, neglect of duty, or malfeasance in office," to take the FTC example, 15 U.S.C. § 41 (1976)—were met in the particular removal situation.

[74] President Coolidge is reported to have attempted to circumvent for-cause removal restrictions by demanding a signed resignation from an independent commissioner before he received his commission of reappointment. See E. Corwin, The President—Office and Powers 1787-1957, at 95 & n.87 (1957).

[75] This is the case for the older independent agencies, such as the FTC, FCC, SEC, and NLRB. The power to remove chairmen without cause is not universally recognized, however, and thus may not be constitutionally based; other statutes condition the President's removal power by limiting it to removal for cause. See, e.g., the provision governing the Federal Reserve Board, whose chairman is intended to be independent of the President on matters of monetary policy. 12 U.S.C. § 242 (Supp. II 1978). Other statutes fix the chairman's tenure, see, e.g., 15 U.S.C. § 2053 (1976) (Consumer Product Safety Comm'n). Nonetheless, the President can make effective use of his power to remove the chairman when he believes an agency's policy functions are being managed poorly. For example, calling for "fresh leadership," the President recently removed the NRC chairman,

B. *The Power to Control*

The power to control subordinates who make policy is at the core of any presidential effort to achieve accountability. The word "control" has several meanings in this context. In one sense it reflects the process of management control, which demands that the executive speak with one voice and imposes a structure on decisionmaking that includes clearing major policy matters with the White House. For the independent agencies, however, the word is better translated as "cajole," since this is as far as the President can go if he is to retain the support of Congress. "Control" also implies that the President may on occasion actually make decisions himself, even though the decisionmaking responsibility is nominally placed in the hands of subordinates.

In some matters the President has the constitutional responsibility to decide, even though he may act through subordinates. Thus, some cabinet officers are notable for a lack of independence. Certainly this is the case with the Secretary of State,[77] as evidenced by recent events culminating in the resignation of Secretary Cyrus Vance when he disagreed with a major presidential policy decision. And, since the administration of Andrew Jackson,[78] it has been clear that the

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giving that position to another commission member for the duration of the term, at which time the President could designate a new chairman from outside the agency. See White House Press Release, Dec. 7, 1979, at 1.

[76] A commissioner removed as chairman may remain on the commission if his or her term has not expired. Therefore, the President's power to reappoint a new chairman may be restricted to those who currently sit. In the case of cabinet officers, of course, the President is free to appoint anyone he chooses as a replacement.

[77] In Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall conceded that the President's decision power was absolute in the "political field" of foreign affairs. Id. at 166. As a consequence, the Secretary of State has no "independence" in the formulation of relations with foreign governments, and Congress could not constitutionally reallocate this inherently executive responsibility by statutory manipulation. Also, under Elrod v. Burns, 427 U.S. 347 (1976), which sanctions the patronage discharge of "policymaking" officials because they may be in a position to "thwart the goals of the in-party," id. at 367, the Secretary of State would presumably be first on the list of vulnerable policymakers who could so "thwart" presidential policy. This aspect of *Elrod* was not compromised by Branti v. Finkel, 100 S. Ct. 1287 (1980), in which the Court rejected the patronage discharge of two assistant public defenders.

[78] The classic situation arose when Andrew Jackson ordered the district attorney to discontinue condemnation proceedings on behalf of the United States concerning the jewels of the Princess of Orange. The jewels had been imported into the United States without payment of duty and, while condemnation proceedings were pending, the President learned that they had been stolen from the House of Orange and decided to return them. In an opinion by Attorney General Taney, it was said that the President, under his power faithfully to execute the laws, could order the Attorney General to dismiss the prosecution and return the jewels. The district attorney might ignore this order at his peril, since the President could replace him with someone agreeable to dismissal. The President could not, however, order the dismissal himself. 2 Op. Att'y Gen. 482, 489 (1831).

President has the right to control the prosecutorial discretion of the Attorney General.[79] This power is subject to limits, however. Once a prosecution begins, the due process clause forbids interference in the decision process by the President or any outsider. But the President may control the prosecution and remove the Attorney General if he or she refuses to prosecute or refuses to dismiss a prosecution.

Many decisions made by executive officers, even those operating in areas traditionally controlled solely by the President, spring from statutory authority granted by Congress. While the President may desire to control this kind of decisionmaking, Congress can place limits upon his power to do so.[80] There is no question, for example, that Congress has the right to enact environmental legislation and to place the final decision on implementation of the Clean Air Act in the Administrator of the EPA. The President cannot simply usurp that decision as part of his executive function. However, any President interested in achieving coordination of policymaking would maintain that there is a difference between deciding for a subordinate and exercising management control over the decision process. In the former case the subordinate acts solely as a convenience to the executive branch; in the latter the subordinate has a decisional role assigned by Congress.

There are several ways for the President to ensure management control without usurping the decision process. The most emphatic method is to threaten subordinates with removal if they do not cooperate. As Jody Powell put it to the leaders of the EPA: If you don't do as the President says, you can look for work elsewhere.[81] But removal is a doomsday machine; it can be both an overwhelming and an inadequate device for controlling or formulating policy. Like the principle of massive retaliation in defense policy, removal is such an extreme solution that it is, as a practical matter, unavailable in the ordinary course. Moreover, where the subordinate sought to be removed has strong supporters in Congress or among influential interest groups, it is too costly politically to utilize as a policymaking instrument. As a result many Presidents would rather suffer occasional insubordinations than risk continual confrontations.

To be effective, the power to remove must imply the lesser power to counsel subordinates privately and to consult before the axe falls. Any other analysis would render the President a helpless giant when it comes to coordinating the policymaking functions of his subordinate officers. Not only does the removal power suggest authority to oversee policymaking, but the article II power to require the written opinion of subordinates also implies an ability to confer and discuss policy matters.

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[79] Directly under the Attorney General is the Office of the Solicitor General, whose function is to reflect the position of the United States before the Supreme Court and to coordinate—and often override—agencies' understandings of the government's position. See, e.g., Train v. Colorado Public Interest Research Group, 426 U.S. 1 (1976), where the Solicitor General decided which agency should have jurisdiction to control discharges of radioactive materials into navigable waters, and then argued its position to the Court. It has never been suggested that this coordination function, which is clearly executive in nature, should not be placed in the hands of the President and Attorney General.

[80] In Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973), the court held that President Nixon could not legally discharge the Special Prosecutor, Archibald Cox, because of a valid Department of Justice regulation that limited such discharge to situations in which the special prosecutor was guilty of an "extraordinary impropriety." Had there been no such regulation, the President's power to fire presumably could not have been successfully challenged. Cf. L. Tribe, supra note 72, at 19 (arguing that Congress could constitutionally by legislation insulate a special prosecutor from presidential removal). See also Kendall v. United States, 37 U.S. (12 Pet.) 524, 610-12 (1838).

[81] See note 13 and accompanying text supra.

Ultimately, this power to control, coordinate, or guide the policymaking of subordinates may be the only way to keep agencies accountable to the executive branch and the electorate. The basic message of *Myers* is that under article II the President "may properly supervise and guide"[82] the decisions of administrative officers.

As a theoretical matter, this constitutional authority to control policy should extend to chairmen of independent agencies over whom the President has the power of appointment and removal.[83] In a collegial body of five or more commissioners, conferences with the chairman will not ensure totally coordinated policymaking. But the "executive role" of independent agency chairmen is considerable, especially in personnel and budget matters, and it is also said to dominate policy decisions that arise in the rulemaking process.[84] If, for example, the President wants the chairman of the ICC or the CAB to emphasize deregulation as part of a rulemaking program, he should be free to appoint officials with those views, to meet with them privately about those matters during their stewardship, and to remove them as chairmen if they fail to deliver.

C. *The Need for Consultative Privacy*

Assuming the President has executive power to control the policymaking of cabinet officers, related executive officials, and, to a lesser extent, chairmen of independent agencies, the question remains to what degree should contacts with these officials remain private and beyond the scrutiny of the public? The President's right to consult with White House staff and advisors and their right, in turn, to meet privately with White House staff subordinates on behalf of the President are also implicated by this question. To answer this inquiry it is necessary to examine the scope of executive privilege as well as the scope of White House staff consultative privacy when Congress has not legislated on the matter.

1. *The President's Privilege*. In *United States v. Nixon*,[85] the Supreme Court carved out a privilege of confidentiality for conversations between the President and his staff, reasoning that they "must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. . . . The privilege is fundamental to the operation of Government and inextricably rooted in the separa-

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[82] 272 U.S. at 52.

[83] Professor Cary reports that when he was chairman of the SEC he met frequently with Presidents Kennedy and Johnson on policy matters. See W. Cary, supra note 71, at 13-26.

[84] See D. Welborn, Governance of Federal Regulatory Agencies 137 (1977). Professor Welborn also suggests that the chairman's power will increase as agencies have to deal with the effect of the sunshine law on formal meetings. Id. at 168 n.2. See also Zamir, Administrative Control of Administrative Action, 57 Calif. L. Rev. 866 (1969).

[85] 418 U.S. 683 (1974).

tion of powers under the Constitution."[86] This privilege should apply equally when presidential staff and advisors seek to confer in private with cabinet officers and administrators of executive agencies, for they also need "to explore alternatives" in setting policy. The ability to function effectively protected by the separation of powers extends to the entire executive branch. As the *Nixon* Court pointed out, "[H]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."[87]

Private discussions between the President and his advisors concerning the relationship of inflation or energy policy to problems of the environment, safety, or health fall under this privacy umbrella. Discussions on these subjects during a cabinet meeting would be especially sensitive, but other meetings among the President, cabinet officers, and senior advisors, such as the discussions with Marshall and Schultze about the cotton dust rules, should be protected for similar reasons. So long as the President is directly involved in the discussions, the need for an executive privilege is strong.

The executive privilege relating to control of administrative officials is not unbridled. One restraint on secret policymaking by the President is inherent in the concept of separation of powers, requiring no judicial intervention. If the public is worried about the veil of secrecy cloaking all discussions between a President and his cabinet officers, the established practice of cabinet members going before Congress to answer questions can serve as an antidote. This separation of powers mechanism, reflected in early practice under the Constitution,[88] checks the exercise of executive privilege by subjecting the decisions of executive agency officials to public scrutiny. Of course, its effectiveness is dependent upon electing a President who honors the tradition, something that is not guaranteed to occur.[89]

Another check on the use of the presumptive executive privilege emerges from the *Nixon* case. The Court emphasized that the privilege is limited by countervailing constitutional interests, such as due process.[90] The overriding interest in that case was the needs of the criminal justice system. A comparable interest emerges from the present inquiry, although it is grounded in civil, rather than criminal, process. The due process limitation in *Nixon* comes into play if a President seeks to go beyond coordination of policy to control of outcomes in adjudication.[91] This distinction between rulemaking and adjudication helps to confine the executive privilege doctrine and should discourage future Presidents from seeking to exploit the privilege beyond the policymaking context. For example, if a President intervened to direct the issuance of a television license to a campaign contributor, those participating in the licensing process could raise a due process objection[92] that might move a court to require any presidential conversations with the FCC commissioners to be placed in the record. A similar situation can arise in connection with executive officials, even though cabinet officers and departmental heads are likely to find that their policymaking function is larger than their adjudicative one;[93] if it does arise, as it did in the Quarles-Flanigan situation, when the White House sought to influence the conduct and outcome of litigation, there is nothing in the relationship between the executive agency and the President that should override the due process interests.

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[86] Id. at 708 (footnote omitted). The Court went on to state that outside of the national security context the privilege was presumptive rather than absolute, and that it must yield to legitimate interests of the "adversary system of criminal justice." This due process interest was present because President Nixon attempted to invoke executive privilege to defeat compliance with a judicial subpoena in a criminal proceeding. This dark side of *United States v. Nixon* should not arise in the kind of policymaking coordination discussed in this Article.

[87] Id. at 705 (footnote omitted).

[88] See E. Corwin, supra note 74, at 296; A. Schlesinger, supra note 54, at 390 (asserting that this practice made for "openness and responsibility in government").

[89] President Nixon was accused of engaging in a "calculated disparagement of the cabinet" by shifting responsibility to White House aides and then cloaking these aides with executive privilege when they were called upon to testify before Congress. A. Schlesinger, supra note 54, at 252-53.

[90] 418 U.S. at 709.

2. *The White House Advisor's Privilege*. The situation is different when it is the President's advisors who want to engage in privileged communications with cabinet officers, executive agency heads, or other agency officials. Although this is the most frequent kind of contact,[94] it is not clear that this type of "presidential" involvement deserves the same article II protection.

The executive privilege undoubtedly has a "vertical effect," since its purpose is to protect conversations between the President and his advisors, cabinet officials, and administrators. It is not so readily apparent, however, whether the privilege has a "horizontal effect" between White House staff and agency staff. The protections that allow some congressional check on secret decisionmaking by cabinet officers do not apply to presidential aides. White House staff members are not subject to Senate confirmation, nor do they traditionally appear before congressional committees. For these reasons the extension of executive privilege to the staff must be separately justified.

An argument in favor of the horizontal effect is that the President does not have the individual capacity to control the bureaucracy personally. If he cannot rely on his staff to carry out most executive policy, he cannot discharge his responsibilities under article II. Under this analysis the President instructs his White House staff on administration priorities, but turns over to them the actual contact with subordinates in the agencies. Some case law recognizes the practical necessity of this view.[95]

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[91] This raises the traditional distinction between rulemaking and adjudication offered by Justice Holmes in Bi-Metallic Inv. Co. v. Colorado, 239 U.S. 441 (1915), which plays off the due process interest established for informal adjudication in Londoner v. Denver, 210 U.S. 373 (1908).

[92] See Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959); Peck, Regulation and Control of Ex Parte Communications with Administrative Agencies, 76 Harv. L. Rev. 233 (1962).

[93] Independent agency commissioners often perform a role similar to appellate court judges in that they regularly review adjudications by administrative law judges who work in their agencies. This role is rarely played by executive agency heads or cabinet officials. See text accompanying notes 67-68 supra.

[94] In the strip mining rule, for example, the major contact was between White House and CEA staff and lower officials of the Department of the Interior who worked in the Office of Surface Mining. See notes 17-24 and accompanying text supra.

The fear often expressed, however, is that White House staff may use their positions to pursue agendas of their own that only vaguely reflect presidential direction.[96] By cloaking these political messengers with a privilege of secrecy, anonymous government by unaccountable bureaucrats is encouraged. This view suggests that presidential accountability can be as easily frustrated as vindicated by the unrestrained use of White House staff. Unfortunately, most of the proposals to guard against these consequences are themselves fraught with valid apprehensions. Nevertheless, differential treatment between the vertical and horizontal effects of the privilege need not offend article II.

The basic question is whether Congress could constitutionally require White House staff contacts with agency subordinates to be made on the record or even prohibit them altogether. It would in all likelihood be unconstitutional under *United States v. Nixon* for Congress to attempt by legislation to deprive the President of his executive privilege in private vertical dealings with staff and cabinet officers. The President is not involved, however, in a horizontal exchange of views. Thus, if one extended the privilege automatically to cover such dealings, there would be no way, absent written delegation, to determine if in fact the White House staff was executing a previously discussed presidential policy or creating one of its own. For this reason the *Nixon* privilege could be viewed as personal to the President in dealings with subordinates.[97] In short, personal presidential contact makes the privilege available; lack of direct contact renders it unavailable.

While this is a burdensome interpretation for the modern presidency, it would reflect the importance the President attaches to a particular contact and provide a check against the abuse of executive privilege, limiting its scope to those minimum contacts that are essential to the functioning of the executive branch. Under this analysis secret policy coordination would take place only at the presidential level; if it were given lesser status, it could not share in the executive's privilege.

But this minimalist approach unrealistically restrains the making of executive policy. It is obvious that no President can personally direct domestic policy and still discharge the other responsibilities of the office. A President should at least have the power to convert a contact between his staff and agency subordinates into a "presidential communication" by explicit instructions in advance. Written delegation to staff must be able to serve the same function as a direct presidential contact if presidential policy coordination is to be effective. Where there is no explicit delegation, however, the constitutional basis for a privilege of confidentiality is weakened. In this situation congressional limitations upon executive confidentiality may be strong enough to override a generalized claim of executive privilege.[98]

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[95] In Myers v. United States, 272 U.S. 52, 117 (1926), Chief Justice Taft recognized that in order to execute the laws the President must be able to "select those who were to act for him under his direction."

[96] Many of the points made by William T. Coleman are applicable here, see note 44 and accompanying text supra.

[97] *Nixon* involved only the issue of the confidentiality of conversations between the President and his close advisors. 418 U.S. at 703. It therefore did not deal directly with the confidentiality of the advisors' communications with other executive officials. In discussing the scope of executive privilege, however, the Court referred to "Presidential communications" in a way that could encompass communications between a presidential advisor and agency subordinates. The Court also showed concern for a "President and those who assist him." Id. at 708. The question ultimately to be resolved is whether the privilege of White House advisors and agency subordinates "relates to the effective discharge of the President's powers." If so, it has a constitutional base. Id. at 711.

However, there are no congressional enactments that seek to test the limits of executive privilege in this manner, and so this potential constitutional crisis has not arisen. Practically speaking, White House staff members are virtually unrestrained by legislation in their dealings with agency staff on policy matters.[99] One wants to read the lack of rules in this area as indicating that Congress does not believe it is desirable to restrict the private contacts of White House staff. Although extracting meaning from congressional silence is a treacherous activity, it cannot be avoided in this case, because the relative competence of one branch to confine the activities of the other is at stake. *Youngstown Sheet & Tube Co. v. Sawyer*[100] teaches that where Congress has been silent, the President has considerable room to assert his executive power. As Justice Jackson stated in his famous concurrence:

> When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures of independent presidential responsibility.[101]

In this "zone of twilight," the critical inquiry is whether congressional silence on the subject of White House staff activity is the product of informed consent. The next section discusses the various approaches Congress has taken to control the executive branch, short of direct limitations upon the "executive" privilege of White House staff.

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[98] In order to protect against policymaking by unchecked and unaccountable political assistants, Congress might want to pass legislation limiting the use of the executive privilege to contacts made directly by the President or by those working under his explicit delegation. Since this issue could be determined by a court in camera, there is no clear reason why the *Nixon* case would render it unconstitutional.

[99] One possible exception is § 307(d)(4)(B)(ii) of the Clean Air Act Amendments of 1977, 42 U.S.C.A. § 7607(d)(4)(B)(ii) (1979), which requires that all written comments to the EPA by the White House, including OMB, be placed in the rulemaking docket. But these written comments are specifically excluded from the record upon which judicial review is based, 42 U.S.C.A. § 7607(d)(7)(A) (1979). These sections do not mention oral contacts, and EPA has taken the position that such interchanges with White House staff do not need to be recorded. The reach of these provisions is currently being tested. See American Petroleum Inst. v. Costle, No. 79-1104 (D.C. Cir., filed Nov. 19, 1979).

[100] 343 U.S. 579 (1952).

[101] Id. at 637. In a footnote at the end of this paragraph, Jackson asks the reader to "compare" *Myers* and *Humphrey's Executor*. This is a cryptic message, but it does indicate that the focus of Jackson's concern in text was upon the presidential removal cases.

III. THE CONGRESSIONAL POWER TO RESTRAIN WHITE HOUSE CONTROL OF AGENCY POLICYMAKING

Congress is not powerless to restrain the President or his staff in dealing with administrative agencies. Under our scheme of separation of powers Congress can frequently check presidential power through legislation. In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court recognized that presidential powers interact with those of Congress, so that when Congress has expressed its will in a manner incompatible with presidential action, the executive power is "at its lowest ebb."[102] As a result, the President has rarely deemed it advisable to contradict an express legislative will. If Congress passes a statute designed to achieve a stated objective, it does not matter whether the particular decisionmaker is an independent agency or an executive agency or whether the President "controls" the decision; Congress's will is to be respected.

Congress has frequently legislated on matters related to executive control of decisionmaking, although mostly in an indirect manner. The most common areas of legislation are the budgetary process, the delegation of statutory duties, and procedural restraints upon agency policymaking. A review of this experience should help to determine whether or not congressional silence on the legitimacy of horizontal contacts between White House and agency staffs is informed.

A. *The Budgetary Process*

In the early years of the administrative state, Congress dealt directly with each agency on its annual budget requests, thus maintaining substantial control over agency activities, including policymaking. This was, however, a costly and cumbersome process, and in 1921, with the passage of the Budget and Accounting Act,[103] which granted the President the power to submit an annual budget for executive agencies to Congress, considerable practical control over administrative policymaking shifted to the executive branch. A further shift occurred when the Act was amended to include independent commissions and boards within the President's budgetary control.[104] Today, the Office of Management and Budget (OMB) exercises central control over agency budgets, and frequently over their policies as well.[105]

But Congress still retains considerable control over the budgetary process and could withdraw agencies from OMB jurisdiction should it perceive the need to do so. Indeed, Congress has recently seen fit to retain direct budgetary control over certain independent agencies.[106] By this ebb and flow of control over agency budgets, Congress demonstrates a willingness both to accede to and to check presidential control over administrative policymaking. Since Congress also has recourse to the General Accounting Office and the recently created Congressional Budget Office, there is little reason to believe that it is helpless in the face of executive manipulation of the budgetary process.[107] If the proposal now being discussed for a regulatory budget ever becomes a reality, Congress will be in a position to monitor closely the impact of regulation upon the public.[108]

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[102] Id. at 637.

[103] Pub. L. No. 67-13, 42 Stat. 20 (1921) (codified at scattered sections of 31 U.S.C. (1976)).

[104] Section 2 of the original act had defined "department or establishment" to include "executive department [or] independent commission." Id. § 2. The 1939 amendment added the phrase "independent regulatory commission or board" as a reaction against uncertainties caused by the *Humphrey's* decision. See 31 U.S.C. § 2 (1976); 84 Cong. Rec. 2315 (1939) (remarks of Representative Warren).

[105] In 1970 the Bureau of the Budget, which had earlier been transferred from the Treasury Department to the Executive Office of the President, became OMB. Reorganization Plan No. 2 of 1970, 84 Stat. 2085.

B. *The Delegation Process*

Congress exercises influence over administrative policymaking simply by deciding where to place administrative responsibility. For example, Congress can blunt the fear of excessive executive interference by assigning a particular statutory duty to an independent agency. The meaning to be given to a congressional choice of the independent agency format has never been clearly established. But the structure of these agencies does suggest a congressional design to insulate their decisions from presidential politics. For example, by balancing the membership of these agencies between the two political parties and by creating fixed terms that may exceed a President's term of office, Congress has indicated that these agencies should function outside the realm of politics and perhaps within some abstract mold of balanced or rational decisionmaking.[109]

Thus, if Congress has been able to restrict executive and White House staff influence over administrative policymaking by establishing an independent agency, a reverse inference may presumably be drawn when Congress creates an executive agency. By choosing to christen an executive agency as the policymaking vessel, Congress makes a considered judgment about the need for stronger executive and political control. Indeed, a fair reading of the removal cases suggests that if Congress places a policymaking responsibility in an executive branch agency, it cannot keep the President from exercising his duty to control the subordinate decisionmaker.[110] Any attempt to do so would run afoul of the President's power under article II.

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[106] For example, Congress has exempted the Consumer Product Safety Commission, the ICC, and the Commodities Futures Trading Commission from OMB budget review. See 15 U.S.C. § 2076(k) (1976); 31 U.S.C. § 11(j) (1976); 7 U.S.C. § 4a(h) (1976).

[107] As demonstrated by the recent struggle over executive impoundment of appropriated funds, Congress can be an effective advocate of its own budgetary interests. When President Nixon asserted an inherent power to impound funds appropriated for government programs, Congress passed the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified in part at 31 U.S.C. §§ 1400-1407 (1976)), which severely restricted the President's use of impoundments. See also Local 2677, Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60 (D.D.C. 1973) (finding no inherent presidential impoundment power).

[108] The regulatory budget would allow Congress to set upper limits on the costs of regulations imposed on the private sector, and to divide these costs among the various agencies. See generally DeMuth, The Regulatory Budget, 4 Regulation 29 (Mar./Apr. 1980) (approving concept in abstract but questioning feasibility of implementation).

[109] The independent agencies are organized to be free from executive control. Their members are not only entitled to fixed terms with for-cause removal restrictions, but they are selected on a bipartisan basis. See discussion by Leventhal, J., Environmental Law Institute Colloquium, Spring 1979, at 95 (F. Anderson ed.).

A different aspect of the problem of White House staff influence over executive agency subordinates arises when Congress places the decision locus not in an independent commission, but in the President himself. This occurs when Congress wants the President to have direct responsibility and control over certain significant policies. Tariff decisions fall into this mold,[111] as do policy decisions involving such matters as the routes for the Alaska pipeline[112] and for international airlines[113] and export licenses for nuclear material.[114]

The issue is not simply a tug-of-war for decisionmaking control between Congress and the President. In some matters Congress grants the President direct decisional responsibility rather than protecting its prerogatives through the insulative device of an independent agency. In others it chooses to place responsibility in executive agencies, presumably aware of the consequences of that choice for presidential control.[115] Conversely, the President may not always want direct political responsibility and will favor a grant of authority to an executive or even an independent agency.[116]

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[110] Congress still retains the discretion, however, not to grant rulemaking power to executive agencies or to do so only with formal procedures. See text accompanying notes 135-37 infra

[111] The Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590, established a Tariff Commission, which made recommendations to the President that he could accept or reject as he saw fit without judicial oversight. See United States v. George S. Bush & Co., 310 U.S. 371 (1940). Today these recommendations are made by the International Trade Commission. See 19 U.S.C. §§ 2251-2253 (1976).

[112] The decision on the pipeline was to be made by the President subject to congressional review. See 15 U.S.C. §§ 719e,f (1976).

[113] 49 U.S.C. § 1461 (1976) See also Exec. Order No. 11,920, 41 Fed. Reg. 23,665, 23,666 (1976) (prohibiting private ex parte contacts with White House staff while route certifications are before the President).

[114] See the Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, 92 Stat. 120 (1978) (codified at 22 U.S.C. §§ 3201-3282 (Supp. II 1978)). Congress vacillated on the question of who should have political control of this sensitive area, shifting the locus of decisionmaking power first from the State Department to an independent agency, the Nuclear Regulatory Commission, and then back to executive control by the President. The NRC continues to have a role, albeit more limited. If the State Department approves an export license, the NRC may then render its opinion. If it disapproves of the State Department action, the President may overrule, but then the matter is laid before Congress for 60 days, during which time that body can veto the presidential decision

[115] Congress has also tried to have it both ways in a single delegation. The Department of Energy Organization Act was designed to unify energy policy in a cabinet-level executive agency. Congress, however, decided that the functions of price setting for natural gas, formerly performed by the Federal Power Commission, should be retained by a new independent agency, the Federal Energy Regulatory Commission, located within DOE. Opponents of deregulation feared placing price-setting power in the hands of cabinet officials and preferred the protections that would be available with a collegial body, such as the Sunshine Act, see text accompanying notes 123-30 infra. For a good discussion of the political infighting that led to this Jonah-in-the-whale compromise, see Byse, The Department of Energy Organization Act: Structure and Procedure, 30 Ad. L. Rev. 193, 198-203 (1978).

[116] This situation occurred recently when the President failed to endorse the Kameny Commission's recommendation that nuclear power safety responsibilities be removed from the NRC and placed in a single administrator subject to greater presidential control. See President's Remarks in Response to the Report of the Commission on the Accident at Three Mile Island, 15 Weekly Comp. of Pres. Docs. 2202 (Dec. 7, 1979). The President had earlier opposed the merger of the NRC into the Department of Energy "[b]ecause public concerns about the safety of nuclear power are so serious." President's Energy Reorganization Message to Congress, 35 Cong. Q. 404 (1977).

Sometimes, however, Congress has recognized that it delegated too much responsibility directly to the President. For example, President Truman once complained that looking over and signing papers on his desk "takes 3 hours every night."[117] Congress responded by passing the Presidential Subdelegation Act of 1951,[118] which permitted the delegation of more than 400 duties then imposed on the President.[119] Most of the listed duties seem trivial;[120] some, however, involve responsibilities for Indian affairs and the use and exploitation of government land that would hardly be taken lightly today.[121]

Perhaps the most interesting aspect of the Act for present purposes is that it specifically preserves the President's "inherent right" to delegate without express authorization.[122] Congress thus appears to recognize that the President has power under article II to delegate duties to his own staff and other executive officials that cannot be monitored by Congress through the publication requirements of the Subdelegation Act. Arguably, Congress also recognizes the President's need to delegate supervisory responsibilities over executive officials to the White House staff without public notice of the delegation. At a minimum, the Act reflects a long-standing congressional concern with the burdens on the presidency and an acceptance of the theory of inherent power to manage executive branch policymaking.

C. *The Use of Procedures*

Congress has achieved a certain degree of control over the activities of the White House staff simply by imposing procedural requirements upon the administrative agencies they seek to influence. These requirements govern public meetings, access to documents, and procedural rights in rulemaking.

In the Government in the Sunshine Act[123] Congress has required collegial agencies (those that have two or more appointed members) to open their meetings to public scrutiny.[124] The policy of the Act is to make public the decision process of collegial bodies. It thus ensures that independent agencies are unlikely to be influenced by private White House staff contacts during the informal rulemaking process.[125]

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[117] See S. Rep. No. 1867, 81st Cong., 2d Sess. 1, reprinted in [1950] U.S. Code Cong. Serv. 2931.

[118] Pub. L. No. 82-248, 65 Stat. 712 (1951) (codified at 3 U.S.C. § 301-303 (1976)).

[119] The act provides that "[s]uch designation and authorization shall be in writing, shall be published in the Federal Register, shall be subject to such terms, conditions, and limitations as the President may deem advisable, and shall be revocable at any time by the President in whole or in part." Id.

[120] S. Rep. No. 1867, supra note 117, at 4-6, [1950] U.S. Code Cong. Serv. at 2934-37.

[121] Id. (examples 19-28). These responsibilities are now vested in the Secretary of the Interior. Over the years Presidents from Truman to Carter have used this act to delegate by executive order literally hundreds of duties. See note following 3 U.S.C.A. § 301 (1977 & Supp. 1980).

[122] 3 U.S.C. § 302 (1976) provides:

> This Chapter shall not be deemed to limit or derogate from any existing or inherent right of the President to delegate the performance of functions vested in him by law, and nothing herein shall be deemed to require express authorization in any case in which such an official would be presumed in law to have acted by authority or direction of the President.

[123] Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. § 552b (1976)). See generally R. Berg & S. Klitzman, An Interpretive Guide to the Government in the Sunshine Act (1978).

The reach of the Sunshine Act is a potentially delicate issue. By limiting its coverage to collegial bodies, Congress focused primarily on the independent agencies, which are organized on that basis. Congress thus avoided the larger issue of its constitutional power to require executive agencies under the President's control to be open to public scrutiny. There are, however, a few agencies covered by the Act that do not fit the traditional molds. The Council on Environmental Quality,[126] a three-member body appointed by the President with the advice and consent of the Senate, advises the President on national policies relating to improvement of the environment. The Council avoided a potential confrontation between Congress and the President when it enacted sunshine regulations.[127] The Council of Economic Advisors,[128] on the other hand, has refused to promulgate sunshine rules, relying primarily on the fact that it is part of the Executive Office of the President.[129] Even if the Sunshine Act is eventually limited to independent agencies, it remains a significant congressional tool for regularizing the administrative process and reducing the potential influence of ex parte contacts by the White House.[130]

The Freedom of Information Act (FOIA),[131] which makes government records publicly available upon request, also serves as a congressional device for publicizing the decisional processes of administrative agencies. It is now possible for any interested person to obtain written communications between White House staff and personnel of both independent and executive agencies[132] unless there is a specific exemption from disclosure, such as the narrow exemptions incorporating confidentiality requirements emanating from the concept of executive privilege.[133] Practically, the increasing public disclosure of White House staff memoranda to agency officials will mean that written White House contacts are less likely to be secret. In effect, the FOIA has become a method for public participation in the political process of agency policymaking.[134]

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[124] There are ten specified exceptions to this open meetings requirement, 5 U.S.C. § 552b(c) (1976). In general these exceptions track those contained in the Freedom of Information Act, 5 U.S.C. § 552(b) (1976).

[125] Indeed, the exceptions to open meetings by collegial bodies may not even apply to *formal* rulemaking proceedings. For example, exemption 10 relates to "the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing." Although it is obviously not adjudication, formal rulemaking does involve a determination on the record after opportunity for an agency hearing. The legislative history is in conflict on whether formal rulemaking is within the exemption. See R. Berg & S. Klitzman, supra note 123, at 27-28. At least one commission has decided that it is within the exemption. See 42 Fed. Reg. 13,288 (1977) (Postal Rate Comm'n).

[126] The Council was established by the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified in relevant part at 42 U.S.C. §§ 4321, 4342 (1976)).

[127] See 42 Fed. Reg. 8673 (1977) (proposed rules); 42 Fed. Reg. 20,818 (1977) (final rules).

[128] The Council was established by the Employment Act of 1946, Pub. L. No. 79-304, 60 Stat. 23 (1946) (codified in relevant part as amended at 15 U.S.C. § 1023 (1976)). It is composed of three members appointed by the President with the advice and consent of the Senate.

[129] Discussion by author with CEA staff, December 1979.

[130] The Sunshine Act also amended the APA by adding a restriction against ex parte contacts to the formal adjudication and rulemaking requirements. 5 U.S.C. § 557(d)(1) (1976). See also 5 U.S.C. § 551(14) (defining "ex parte communications"). See generally text accompanying notes 138-39 infra.

[131] 5 U.S.C. § 552 (1976).

[132] The CEA maintains that it is not an "agency" for purposes of FOIA coverage. The Council relies upon legislative history of the FOIA that exempts the President's immediate staff or units in

A third congressional technique for controlling White House contacts with agency personnel is the utilization of procedures imposed by the Administrative Procedure Act (APA). Congress is free to control White House influence over agency rulemaking by mandating that rules be promulgated according to the formal rulemaking requirements of the APA,[135] which ensures that factual and policy matters arising in a rulemaking are subject to full hearings and on-the-record judicial review based on the substantial evidence test.[136] Just as locating a substantive program in an independent agency reduces the degree of White House staff contact and control, imposing formal procedures reduces the possibility that nonrecord contacts will affect the outcome of administrative decisions, because it is difficult to see how secret contacts by the White House could materially affect a decision made with this kind of formality. Since Congress can extend the formal rulemaking process to executive as well as independent agencies,[137] the use of procedures is a means of asserting control over executive policymaking that might not be achievable in a more direct manner.

In 1976 Congress amended the APA explicitly to forbid ex parte contacts in formal rulemaking.[138] While there was no indication that Congress was directing this amendment at contacts by the President or the White House staff,[139] the action reflects strong congressional concern about the problem of ex parte communications. With this addition, which bolsters the record restrictions of formal

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the Executive Office whose sole functions are to assist the President. S. Conf. Rep. No. 93-1200, 93d Cong., 2d Sess. 15, reprinted in [1974] 3 U.S. Code Cong. & Ad. News 6285, 6293.

[133] Exemptions 1 (national defense files), 5 (inter- and intra-agency memoranda), and 7 (investigatory records) are likely to include executive branch communications. See 5 U.S.C. § 552(b) (1976). In 1974 and 1976 Congress amended the Act to limit the scope of exemptions 1 and 7. Pub. L. No. 93-502, § 2, 88 Stat. 1561 (1974); Pub. L. No. 94-409, § 5(b), 90 Stat. 1241 (1976). See NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975); EPA v. Mink, 410 U.S. 73 (1973). President Ford vetoed the 1974 amendment to exemption 1 because of executive privilege concerns, 120 Cong. Rec. 36,243-44 (1974), but Congress overrode his veto, id. at 36,622, 36,865.

[134] See Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1670 (1975).

[135] 5 U.S.C. §§ 553, 556-557 (1976).

[136] Id. § 706.

[137] The Food and Drug Administration, for example, is an executive agency that has long been required to follow formal rulemaking procedures. 21 U.S.C. § 355(n) (1976). See generally Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973).

[138] Pub. L. No. 94-409, § 4, 90 Stat. 1241 (1976). The prohibition against ex parte communications was added to § 557 of the APA, which applies both to formal rulemaking and to adjudication.

[139] The prohibition against ex parte communications applies to any "interested person outside the agency." 5 U.S.C. § 557(d)(1) (1976). This definition appears to be focused on private persons who stand to benefit from the agency rulemaking. While White House staff members may be "outside the agency," they are not likely to be "interested persons" in this sense.

rulemaking, it is doubtful that any agency conducting formal rulemaking proceedings would be comfortable with secret contacts from the White House staff.

Congress can also specify procedures for individual agency rulemaking proceedings by organic legislation, as it has done recently with the FTC and the Consumer Product Safety Commission.[140] For these agencies Congress has created a category of hybrid rulemaking that blends informal and formal rulemaking.[141] The on-the-record limitations of formal rulemaking are somewhat relaxed, but the role of the courts on judicial review is greater than it is for informal rulemaking.[142] It is questionable how much congressional control of ex parte contacts ought to be implied by the existence of a hybrid procedure. Since Congress has not employed formal rulemaking directly, the legislative concern with ex parte communications does not appear to be so substantial. These statutory variations demonstrate that Congress can and will impose restrictions on informal rulemaking when it perceives the need to do so, and these restrictions may or may not include explicit ex parte provisions.[143] Under these circumstances, there is little need to construe congressional silence as favoring a blanket prohibition against ex parte contacts.

This analysis suggests that when Congress permits an agency to promulgate rules pursuant to "pure" informal rulemaking, it has considered and rejected other alternatives that would more effectively restrain the White House. This interpretation is buttressed by Congress's decision in 1976 not to extend the ex parte communications provision to informal rulemaking.[144] Congress undoubtedly realizes the current tensions that arise when the White House staff intervenes in agency policymaking. If Congress wants to restrict this practice to its constitutional minimum, it can do so by employing formal rulemaking. Failure to impose formal procedures suggests that Congress realizes that the White House necessarily plays a political role in formulating agency policy. One need only recall the events surrounding the strip mining and ozone rules[145] to realize that Congress itself may want to intervene in the political process of rulemaking, either directly or through the President. In other words, Congress understands the

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140. See, e.g., Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, tit. II, § 202(a), 88 Stat. 2193 (1975) (codified at 15 U.S.C. § 57a (1976)); Consumer Product Safety Act, Pub. L. No. 92-573, § 9, 86 Stat. 1215 (1972) (codified at 15 U.S.C. § 2058 (1976)). See generally Verkuil, The Emerging Concept of Administrative Procedure, 78 Colum. L. Rev. 258, 317-19 (1978).

141. See Verkuil, Judicial Review of Informal Rulemaking, 60 Va. L. Rev. 185 (1974); Williams, "Hybrid Rulemaking" under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. Chi. L. Rev. 401 (1975).

142. The Occupational Safety and Health Act, for example, provides for § 553 informal rulemaking with judicial review of the whole record according to the substantial evidence standard. 29 U.S.C. § 655(b) (1976). The courts have been struggling with the contradiction inherent in this requirement of on-the-record review of a nonrecord proceeding. See Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 472-76 (D.C. Cir. 1974).

143. While Congress is free to experiment with ex parte restrictions in rulemaking that affect the White House, it must of course respect the powers of control conferred by article II on the President or his delegates, including the confidentiality requirements of executive privilege. To date, however, Congress has not sought to restrain the President directly and the issue has not been posed.

144. See text accompanying note 179 infra.

145. See notes 11-24 and accompanying text supra.

political nature of rulemaking, and it may prefer to leave the President and the White House free to control agencies whose decisional independence can cause political problems for everyone.[146]

IV. THE JUDICIAL POWER TO CONTROL EX PARTE CONTACTS BY THE WHITE HOUSE

The preceding discussion demonstrates that the President and the White House staff have legitimate privacy interests in coordinating and controlling agency policymaking that Congress cannot or, as a practical matter, would not abrogate. But Congress is not the only branch that evaluates the role of the executive in administrative decisionmaking—the courts supervise agency decisions on judicial review. While this supervision usually involves interpreting the will of Congress as it pertains to control of the executive, the courts increasingly are creating common law and due process standards of acceptable administrative decisionmaking. These standards, while not necessarily directed at the executive branch, inevitably affect presidential powers of coordination.

The most vivid example is the recently developed judicial doctrine that extends prohibitions against ex parte contacts from the formal process to the informal process,[147] which includes both informal rulemaking[148] and informal adjudication.[149] To date the development of standards for ex parte communications has been limited to nonrecord contacts by private parties. However, respected legal commentary[150] and extrajudicial musings by influential federal judges[151] reveal an inclination to extend the restriction on ex parte contacts to the President and the White House. The courts are likely to be called upon to resolve this issue before long.

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[146] In hearings on regulatory reform legislation designed to structure the President's control over agency policymaking, Senator Percy posed the dilemma as follows: "How do we come to a national policy if the President of the United States can't intervene in a case . . . where [administrative] action might totally contradict a Presidential goal and mandate for the country on something as important as energy." Regulatory Reform Legislation: Hearings on S. 262, S. 755, S. 93 and Other Regulatory Reform Legislation Before the Senate Comm. on Governmental Affairs, 96th Cong., 1st Sess., pt. 2, at 118 (1979) [hereinafter cited as Senate Hearings].

[147] See United States Lines, Inc. v. FMC, 584 F.2d 519 (D.C. Cir. 1978) (informal adjudication); Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977) (informal rulemaking). Cf. Action for Children's Television v. FCC, 564 F.2d 458, 474-77 (D.C. Cir. 1977) (limiting *Home Box Office* to rulemakings involving "valuable privileges"). See also Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978) (regulating intra-agency contacts).

[148] This procedure is governed by § 553 of the APA, 5 U.S.C. § 553 (1976).

[149] This category of decisionmaking is virtually unbounded by APA-imposed procedures.

[150] See Bruff, supra note 28, at 503-05. Others have discussed the subject from a more outcome-oriented perspective. See R. Rauch, supra note 3; Senate Hearings, supra note 146, at 134-51 (testimony of Alan B. Morrison). (Both Rauch and Morrison rely upon Bruff for much of their constitutional analysis.) See also Department of Justice Memorandum, supra note 18.

[151] Judge David Bazelon had the following exchange with Senator Ribicoff during hearings on the regulatory reform legislation:

> Chairman Ribicoff. Should [the ex parte communications prohibition] apply to the President and his advisors as well as the public?
>
> Judge Bazelon. I would say so. That may be a hard one to swallow, but this is an area where courtesy doesn't extend to risking the integrity of the administrative process.

Senate Hearings, supra note 146, at 8.

Before evaluating the application of restrictions to White House contacts, the judicial extension of limitations upon ex parte contacts to private participants in the informal process should be separately considered, because it is not uncontroversial.[152] The serious step of restricting White House communications, which has profound implications for the policy coordination plans of the executive branch, should be taken only if it is clear that the step of extending ex parte contacts to private participants is a sound one. Even if the first step is valid, however, the second step should presumably not be taken if the purpose of and justification for nonrecord contacts by the White House can be differentiated from contacts by private persons in informal rulemaking generally. This section reviews the soundness of the ex parte contact idea in informal decisionmaking and then evaluates its extension to the White House in light of the executive and congressional interests discussed earlier.

A. *The Application of Ex Parte Contact Principles to Informal Decisionmaking*

The making of policy usually occurs in an environment less structured than adjudication because the questions involved transcend individualized interests and the methods of resolving them resist formal standards of proof. Policymaking implies selecting a particular rule or course of action from among several possible choices. If the policymaking framework is a rulemaking, the APA creates an informal process that tries to assure a measure of rationality while recognizing the need for decisional flexibility. But the framework may also encompass "executive" decisions that establish policy by granting exemptions, commencing prosecutions, or approving grants, licenses, or expenditures. In these latter cases the APA is virtually silent on procedures,[153] and thus an "informal adjudication" format has emerged. Historically, judicial doctrine accepted these categories of informal policymaking unless due process interests intervened.[154] Recently, however, the courts on judicial review have looked more carefully at these decisions and their procedures. Relying on the Supreme Court's decision in

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In a colloquium sponsored by the Environmental Law Institute, Judge J. Skelly Wright indicated he was also inclined to extend the restrictions on ex parte contacts to the White House. See ELI Colloquium, supra note 109, at 90-99. See also Wright, Commentary: Rulemaking and Judicial Review, 30 Ad. L. Rev. 461 (1978).

[152] See Association of Nat'l Advertisers, Inc. v. FTC, 617 F.2d 611, 633 (D.C. Cir. 1979) (concurring op. of Wright, J.) (describing the law on ex parte contacts as unsettled). See also Carberry, Ex Parte Communications in Off-the-Record Administrative Proceedings: A Proposed Limitation on Judicial Innovation, 1980 Duke L.J. 65; Nathanson, Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings, 30 Ad. L. Rev. 377 (1978).

[153] The one potential exception is § 555(e), which is being read cautiously to impose a statement of grounds for denial upon agency officials. See Dunlop v. Bachowski, 421 U.S. 560 (1975); see generally Verkuil, supra note 140, at 315-17.

[154] See, e.g., Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959), in which the court imposed an ex parte contact restraint upon informal rulemaking because the procedure affected important private rights of a VHF television station.

Citizens to Preserve Overton Park, Inc. v. Volpe,[155] courts have searched for a record supporting the informal decision and scrutinized its contents closely. This close look has exposed weaknesses in the policymaking process and led to the imposition of record-building procedures similar to those in the formal decision process. The prohibition against ex parte contacts is in this sense a procedure to ensure a better record, and the cases have imposed it equally upon informal rulemaking and informal adjudication. Arguably, however, the justifications for the restrictions vary with the particular decision context.

In *Home Box Office, Inc. v. FCC*,[156] the Court of Appeals for the District of Columbia Circuit remanded cable television rules promulgated pursuant to informal rulemaking procedures for a special hearing on the source and nature of all ex parte contacts.[157] In holding that all ex parte contacts should be forbidden, the court rejected traditional views about informal rulemaking. It stated that

> implicit in the decision to treat the promulgation of rules as a "final" event in an ongoing process of administration is an assumption that an act of reasoned judgment has occurred, an assumption which further contemplates the existence of a body of material—documents, comments, transcripts, and statements in various forms declaring agency expertise or policy—with reference to which such judgment was exercised. . . . As a practical matter, *Overton Park*'s mandate means that the public record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings.[158]

This reliance upon *Overton Park* as the basis for rejecting the view that informal rulemaking is a nonrecord proceeding was questioned by Judge MacKinnon in a belated special concurrence.[159] Shortly after this separate opinion was issued, a panel of the District of Columbia Circuit that included Judge MacKinnon decided *Action for Children's Television (ACT) v. FCC*.[160] This opinion refused to apply *Home Box Office*'s ex parte contact restraints to a rulemaking that did not involve the grant of valuable privileges.[161] The *ACT* court perceived a problem in drawing lines between all the types of sources that might influence a decisionmaker. Noting Congress's apparent intent to permit some ex parte contacts, the court chose to "draw that line at the point where the rulemaking proceedings involve 'competing claims to a valuable privilege.' It is at that point where the potential for unfair advantage outweighs the practical burdens, which we imagine would not be insubstantial, that such a judicially conceived rule would place upon administrators."[162]

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[155] 401 U.S. 402 (1971). *Overton Park* involved informal adjudication; namely, a decision by the Secretary of Transportation on whether to expend federal funds for a highway through a state park.

[156] 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

[157] Id. at 58.

[158] Id. at 54 (footnotes omitted).

[159] Id. at 62. Judge MacKinnon filed his concurrence more than a month after the opinion appeared.

[160] 564 F.2d 458 (D.C. Cir. 1977).

[161] Id. at 474. See also United Steelworkers of America v. Marshall, No. 79-1048 (D.C. Cir. Aug. 15, 1980).

The same court decided *United States Lines, Inc. v. FMC*,[163] which applied the ex parte contacts restraints outlined in *Home Box Office* to informal adjudication.[164] The court relied not only on *Overton Park* and its expansive record requirement but upon concepts of due process as well, stating that "[t]he inconsistency of secret *ex parte* contacts with the notion of a fair hearing and with the principles of fairness implicit in due process has long been recognized."[165]

Several questions emerge from these cases. First, what does *Overton Park* require as it relates to ex parte contacts? Does it make a difference whether the administrative action is informal rulemaking or adjudication? Second, to what extent has the Supreme Court's more recent decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*,[166] limiting courts to the procedures outlined in the APA, precluded the use of ex parte contact restrictions in informal decisionmaking?

1. Overton Park *and Ex Parte Contacts.* The Supreme Court's opinion in *Overton Park* signaled a new era in judicial review. At issue was a definition of the scope of review contemplated by the "arbitrary or capricious" standard of the APA.[167] The Court, while nodding toward the traditional presumption of regularity accorded administrative decisions, subjected an informal adjudication to "a thorough, probing, in-depth review" and a "searching and careful" independent inquiry into the facts. Relying on the "whole record" requirement of the APA,[168] the Court held that the administrative record that was before the Secretary must be presented to the reviewing court to enable it to undertake its independent evaluation. The Court emphasized however, that formal administrative findings were not required.

While it is a dramatic case, *Overton Park* is only part of the picture. The Supreme Court also expounded standards of review for informal adjudication in *Camp v. Pitts*,[169] emphasizing that if, unlike the situation in *Overton Park*, a

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[162] 564 F.2d at 477 (citations omitted). After these cases there is some doubt as to the reach of *Home Box Office*. Since Judge MacKinnon concurred in that case and participated in *ACT*, he may have viewed *Home Box Office* as a valuable-privilege case similar to *Sangamon Valley*. It has been pointed out, however, that the pay cable rules at issue in *Home Box Office* were much more general in their focus than the license determination in *Sangamon*. See Robinson, The Federal Communications Commission: An Essay on Regulatory Watchdogs, 64 Va. L. Rev. 169, 227-30 (1978).

[163] 584 F.2d 519 (D.C. Cir. 1978).

[164] The challenged administrative action involved the issuance of an exemption from the antitrust laws for joint service agreements under § 15 of the Shipping Act, 46 U.S.C. § 814 (1976). This was "informal adjudication" only because the Federal Maritime Commission and the court on review interpreted the statutory "hearing" requirement as not necessitating formal adjudication under §§ 554 and 556-557 of the APA. Compare Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir.), cert. denied, 439 U.S. 824 (1978) (holding that a "hearing" requirement triggers formal adjudication).

[165] 584 F.2d at 539.

[166] 435 U.S. 519 (1978).

[167] 5 U.S.C. § 706(2)(A) (1976).

[168] Section 706 of the APA, which apparently is applicable to all of the scope-of-review provisions, states: "In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706 (1976).

[169] 411 U.S. 138 (1973).

"contemporaneous explanation" for the challenged action exists, the propriety of the administrative findings must be evaluated in light of the record already made.[170] *Camp*, therefore, qualifies *Overton Park* by requiring the reviewing court to confine itself to the administrative record if one exists—the court cannot independently build a record.

Despite this apparent qualification, courts have not relied on *Camp* to moderate the message of *Overton Park*.[171] The courts of appeals have eagerly extended *Overton Park* to the informal rulemaking arena without discussing either its relevance in those situations or the *Camp* reservations.[172] In informal rulemaking, both a "contemporaneous explanation" and an administrative record are likely to exist in the form of a "concise statement of basis and purpose" and the comments and other information received in connection with the rulemaking proceeding. There simply is no *Overton Park* problem of post-hoc rationalization and there is almost certain to be more of an explanation and record than the *Camp* Court found tolerable.

On these grounds alone, one might temper the demands of *Overton Park* in the context of informal rulemaking rather than use the case as a justification for more intensive review. Even though the courts of appeals have not yet so reacted, there are indications that the Supreme Court may be on the verge of reducing the application of *Overton Park* in the informal rulemaking setting. In *Vermont Yankee*, the Court cited *Camp* in discussing the appropriate standard of review of informal rulemaking.[173] The Court also mentioned *Overton Park*, however, so it may be difficult to establish what it will ultimately hold with regard to review of informal rulemaking.[174] There is little doubt, however, that the expectations set forth in *Overton Park* with respect to the administrative record are more appropriate in the informal adjudication setting. Most of the matters that arise in adjudications are more susceptible to findings and record analysis than are the polycentric policy questions found in rulemaking.[175] It is difficult to understand why an informal rulemaking process that satisfies the findings and record requirements of *Camp* should run afoul of *Overton Park*.

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[170] Id. at 143. The Court added that if the finding was not sustainable on the administrative record then the decision must be remanded to the agency for further consideration; in no event was the court itself to build the required record. Id. at 142.

[171] A quick (Lexis) count of the federal cases that cite *Overton Park* since 1971 totals 1,155. *Camp* has been cited only 184 times since 1973. Thus, on the basis of citations it appears that *Overton Park* has virtually eclipsed *Camp* as the precedent for the standard of review.

[172] See, e.g., Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1975), cert. denied, 426 U.S. 941 (1976).

[173] The Court stated that:

> We have made it abundantly clear before that when there is a contemporaneous explanation of the agency decision, the validity of that action must "stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the Comptroller's decision must be vacated and the matter remanded to him for further consideration." *Camp v. Pitts*, 411 U.S. 138, 143 (1973).

435 U.S. at 549.

[174] Id. at 549 n.21. In Strykers Bay Neighborhood Council, Inc. v. Karlen, 100 S.Ct. 497, 502 (1980) (Marshall, J., dissenting), Justice Marshall complained that the Court had ignored *Overton Park* in reversing a determination that an environmental decision by HUD was arbitrary and capricious.

[175] For example, the decision to grant a license to operate branch banks involved in *Camp* affected a valuable individual privilege, thus triggering due process concerns. Due process was not

This analysis has implications for the ex parte contact cases. If courts rely on *Overton Park* to prohibit such contacts, the prohibition should occur only in those situations where *Overton Park*, as modified by *Camp*, is offended. Informal adjudication cases with due process aspects are one such situation. Thus, in *U.S. Lines* the court was on secure ground in imposing a structure upon the existing informal record through a restriction on ex parte contacts. The antitrust exemption sought in *U.S. Lines* is a privilege of economic significance awarded to an individual company, much like the branch bank application sought in *Camp*. Even if the *Camp* Court was satisfied with a less carefully constructed administrative record, it does not seem unreasonable to provide a more secure one, especially where the problem of ex parte contacts is explicitly raised.[176]

When it comes to "pure" informal rulemaking that does not involve valuable privileges, the ex parte contact restriction is less justifiable. *Home Box Office* is such a situation. The FCC made a record constructed from the extensive comments it received, and it also made findings in its concise statement of basis and purpose. It is true that extensive ex parte communications occurred, but they were engaged in by all sides and apparently were of value to the commissioners.[177] The major complaint of the court was that these off-record contacts made the agency's findings a "Fictional account" of the actual decisionmaking process that "must perforce" be arbitrary. But the record envisaged by *Overton Park* and *Camp* is not so rigorously defined,[178] and the standard of review not so readily offended. If it were, it is doubtful that Congress would have provided for informal rulemaking procedures that specifically excluded the very ex parte contact restrictions the *Home Box Office* court sought to read in on review.[179] It should not be forgotten that informal rulemaking involves "interested persons," rather than "parties" in the usual adjudicative sense of the term. The concept of "ex parte" implies a different decisional structure from that involving mere "in-

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implicated in *Overton Park*, however, because rather than raising a specific individual interest, the plaintiffs were merely asserting a "right" to a more agreeable environment. Although this right may enjoy congressional recognition, it does not rise to the level of rights protected by the due process clause.

[176] The proposition would be less sound if the informal adjudication did not directly raise due process concerns. In this regard Secretary Volpe's difficulties with the Three Sisters Bridge construction are instructive. There the reviewing court invalidated the Secretary's decision to approve construction because the decision had been subject to congressional influence. D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972). The court speculated that the rulemaking might have been held valid despite those "extraneous pressures." Id. at 1247. But it is also doubtful whether the interest the plaintiffs sought to protect rose to due process levels, thereby incorporating ex parte contact prohibitions. Since the issue in the Three Sisters Bridge case was whether a hearing was required by statute before the Secretary approved the construction, the due process issue did not arise directly, although Judge Wright had been willing to address it if the court did not locate procedural rights in the statute itself. D.C. Fed'n of Civic Ass'ns v. Volpe, 434 F.2d 436, 437-39 (D.C. Cir. 1970).

[177] See Robinson, supra note 162, at 228-30.

[178] *Overton Park* does discuss the "full administrative record," but that phrase, while susceptible to expansive meaning standing alone, seems qualified by the Court's acceptance in *Camp* of an administratively created record.

[179] See notes 138-39 and accompanying text supra.

terested persons." One can only have a contact without "parties" present in a proceeding where parties are involved, namely adjudication or formal rulemaking.

2. Vermont Yankee *and Ex Parte Contacts*. In *Vermont Yankee* the Supreme Court emphatically instructed the courts of appeals not to add procedures to informal rulemaking other than those specified in section 553 of the APA. The issue in the case was whether cross-examination on critical testimony in an informal rulemaking was a necessary addition to the section 553 ingredients of notice, comment, and statement of basis and purpose.[180] The Court also criticized the assumption that additional procedural ingredients like cross-examination were justified by the applicable standard of review, noting that "informal rulemaking need not be based solely on the transcript of a hearing held before an agency. Indeed, the agency need not even hold a formal hearing. . . . [T]he agency [need only follow] the statutory mandate of the Administrative Procedure Act or other relevant statutes."[181]

With this mandate to comply with the APA, *Home Box Office* bears a heavy burden of justification. The prohibition against ex parte contacts can be viewed as a procedural ingredient much like cross-examination, discovery, or the right to call witnesses. Because it is one of the procedural ingredients from formal adjudication that was specifically left out of section 553 informal rulemaking, adding it judicially flies in the face of the basic message of *Vermont Yankee*.

As a practical matter, however, the FCC and other agencies have imposed ex parte contact restrictions upon themselves in light of *Home Box Office*.[182] If the agencies have done so voluntarily, the *Vermont Yankee* problem does not arise.[183] But some agencies have not yet agreed to restrict ex parte contacts, or have not agreed to restrict them adequately, or would like to change their restrictions if permitted to do so. In these situations, following *Home Box Office* could well lead to a confrontation with *Vermont Yankee*.

In such a case, several "defenses" to the application of *Vermont Yankee* can be raised in the ex parte rulemaking situation. First, it could be argued that the real danger of imposing a requirement of cross-examination on crucial issues was its indeterminacy, a problem that is not present in the context of ex parte contacts. The Court in *Vermont Yankee* feared that an abstract requirement of cross-examination on crucial issues would convert all rulemaking into a full adjudicatory hearing, causing serious delay.[184] By comparison, once ex parte contact rules are established, an agency need no longer worry about their application to a particular rulemaking. Thus, the potential for serious delay does not appear great. Indeed, it may speed things up because the agency will not have to spend time meeting with various interests off the record. But the addition of such a restriction nonetheless inevitably leads informal rulemaking in the direction of formal adjudication.[185]

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[180] 435 U.S. 519, 541 (1978).

[181] Id. at 547.

[182] See 47 C.F.R. § 1 (1979) (FCC rules); 14 C.F.R. § 300.2 (1979) (CAB rules); 16 C.F.R. § 1012 (1979) (CPSC rules). The Consumer Product Safety Commission rules require disclosure of ex parte contacts, whereas the CAB rules ban them. The agencies that have restricted ex parte contacts in rulemaking seem generally to be pleased with the results.

[183] In *Vermont Yankee*, the Court emphasized that "[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." 435 U.S. at 524.

[184] Ironically, this view was inspired by Judge Wright, a proponent of the ex parte contacts development in rulemaking. See Wright, The Courts and the Rulemaking Process: The Limits of Judicial Review, 59 Cornell L. Rev. 375, 387-88 (1974).

Another possible escape route from *Vermont Yankee* lies in the meaning of the "whole record" standard of review arguably present in section 706 of the APA.[186] In *Overton Park*, the whole record requirement was referred to in connection with the "arbitrary or capricious" standard of review, but it is not a concept that has traditionally been applied to informal rulemaking. Informal rulemaking was originally thought to be a process that, like the legislative process itself, did not lead to the creation of a "judicial" record.[187] Recently, however, some courts, by reading the whole record requirement literally, have imported the concept into informal rulemaking review.[188] If this idea takes hold, it is easier to argue, as the court did in *Home Box Office*, that the *whole* record incorporates everything that was before the decisionmaker, including all ex parte contacts. Of course, this interpretation pulls some of the teeth from the *Home Box Office* remedy because it converts the ex parte idea from a prohibitory notion to one that requires disclosure and memorializing instead. But even in this form it effects a significant change in traditional notions of the record associated with informal rulemaking.[189]

Although the *Vermont Yankee* opinion indicates that section 553 rulemaking need not be "based solely on the transcript of a hearing," it also says that the adequacy of a record "turns on whether the agency has followed the statutory mandate of the APA."[190] This statutory mandate, of course, may include the expanded notion of "whole record" in section 706. The most that can be said is that the Court has not clearly stated whether informal rulemaking is bound by record requirements that can be construed to include ex parte contact restrictions as a way of making the record "whole." Since *Vermont Yankee*, however, is the most thorough opinion on this point, its message may supersede anything to the contrary in *Overton Park*. And the message of the later case is that there is a distinct possibility that ex parte contacts should not be forbidden at all in informal rulemaking, or that they should be recorded as part of the rulemaking record but not excluded from its coverage.

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[185] Of course, if one is willing to take the position that informal rulemaking is subject to due process analysis, this formalizing aspect may be viewed as a necessary component of fair decisionmaking. See Note, Due Process and Ex Parte Contacts in Informal Rulemaking, 89 Yale L.J. 194 (1979).

[186] See *Overton Park*, 401 U.S. at 419.

[187] It has always been something of a mystery why the whole-record paragraph should have been placed at the end of the scope-of-review section, since the whole-record concept had been exclusively associated with the substantial evidence test and *Universal Camera*. See 5 U.S.C. § 706 (1976); note 168 supra. The Attorney General's Manual is silent on the application of the whole-record provision except as it relates to the substantial evidence test in § 706(2)(E). See Attorney General's Manual on the Administrative Procedure Act 110 (1948).

[188] See United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977).

[189] See Pacific States Box & Basket Co. v. White, 296 U.S. 176, 186 (1935).

[190] 435 U.S. at 547.

In the context of informal adjudication, the *U.S. Lines* restriction on ex parte contacts may survive *Vermont Yankee*. The principal concern of the *Vermont Yankee* Court was to protect the organizing scheme of the APA. Since that scheme virtually ignores informal adjudication, there is little that the courts can do to disrupt it.[191] Unless one accepts the extreme position that APA "silence" on the subject of informal adjudication implies a substantive desire not to formulate procedures, the courts seem free to create procedures as needs arise without offending the APA. Indeed, it may be that this incremental approach is exactly what the APA architects contemplated when they decided that a general procedural mechanism for informal adjudication was unworkable.[192] Furthermore, informal adjudication usually implicates due process concerns, creating a separate basis of support for imposing ex parte contact restrictions. In *Vermont Yankee* the Court recognized that, even in some rulemakings, "additional procedures may be required in order to afford the aggrieved individuals due process."[193] As a result of these differences the Court could well conclude that "rulemaking in its purest form" would not justify additional ex parte procedures, whereas informal adjudication or "valuable privilege" rulemaking might. Thus, *U.S. Lines* may survive *Vermont Yankee* while *Home Box Office* might not.

B. *The Application of Ex Parte Principles to the White House*

The foregoing discussion should make courts wary of extending the *Home Box Office* rationale without careful analysis. Since the principle is not even firmly accepted as it relates to private contacts in informal rulemaking, it should be evaluated critically before it is read to prohibit ex parte contacts by the President or the White House staff. Most commentary, however, has done little to acknowledge that presidential contacts present judicial review problems of a different order of magnitude. We are simply told, for example, that the President "ought to be treated like everyone else" when deciding how he should participate in administrative policymaking.[194] But the President is obviously not "like everyone else": he happens to have been elected by "everyone else" to run the executive branch and see that the laws are faithfully executed.

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[191] The APA can be segmented into four procedural boxes created by two dividers: a horizontal "formal-informal" distinction and a vertical "adjudication-rulemaking" distinction. If this is done one finds the informal adjudication box virtually devoid of procedural ingredients. The only potential ingredient is the grounds for denial requirement of § 555(e). See note 153 supra.

[192] The indications are that the designers of the APA were impressed by the complexity of the informal decision process and did not desire to "formalize" it into a single procedural mold. See Final Report of the Attorney General's Committee on Administrative Procedure 35-42 (1941) (informal procedures are "truly the lifeblood of the administrative process"). In fact, the majority of the Attorney General's Committee did not even believe that formal adjudication was susceptible to uniform treatment. It was the minority's views on that subject that prevailed when the APA was enacted in 1946. See Verkuil, supra note 140, at 274-78. Even today there is considerable debate about whether an "Informal Administrative Procedure Act" can ever be a reality. See generally Gardner, The Informal Actions of the Federal Government, 26 Am. U.L. Rev. 799 (1977).

[193] 435 U.S. at 542. Compare Note, supra note 185, at 194.

[194] Senate Hearings, supra note 146, at 148 (statement by Alan Morrison). Mr. Morrison meant by this that the President should be able to participate in informal rulemaking only during the comment period.

First let us consider the impact of *Home Box Office* upon the policymaking activities of the President himself. Meetings that he holds with cabinet-level officers must surely be as protected from scrutiny by the courts as they are from interference by Congress.[195] Article II gives the President the power to demand the opinion of his officers in writing and presumably in oral communication as well. At cabinet meetings or at special sessions held to resolve differences, as in the cotton dust proceeding,[196] the President is acting within his exclusive constitutional power.

When the President participates in rulemaking, he should also be accorded some constitutional consideration, at least as his involvement relates to executive agencies.[197] Can it be that a comment timetable set by the agency in a rulemaking proceeding was meant to bind the President as well? It is hard to take seriously the argument that the President's calendar should be controlled by dates set by agencies for organizing public participation. Indeed, it may make better sense for the President to engage in agency policy coordination after the public has submitted comments for the record, because he and his advisors, as well as the agency, can learn from a review of the comments submitted.

While policy coordination does not necessarily require nonrecord discussions, the President's power to execute the laws will undoubtedly be impaired if he is forced to notify the public of all contacts with the agencies. The concept of executive privilege developed earlier suggests that a degree of secret policymaking may be indispensable to candor in decisionmaking. This analysis would make *Home Box Office* inapplicable to ex parte contacts by the President, because the need for executive privacy outweighs the merely statutory interest in seeing the "whole record" on judicial review. The statutory interest is legitimately subordinated to the President's article II power to execute the laws.

When the participation in agency rulemaking takes place at the White House staff level, article II interests are still present. It is reasonable to assume that the President must delegate some of the policy-coordinating function. Although, as previously indicated, Congress may have the power to require written delegations of authority, when it has not so restricted White House staff activities separation of powers interests balance in favor of off-the-record contacts by the executive branch.[198] The "whole record" concept will not be frustrated by this intra-executive-branch contact. So long as the agency and the White House staff are bound by the rulemaking record in their policy discussions, staff participation in the decision process must be limited to suggesting outcomes that are supported by that record. Under this approach, agency and White House staff can be viewed as partners in a process of collaborative decisionmaking. But the notion that the executive branch is a single decisionmaking unit is not without controversy.

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[195] See note 97 and accompanying text supra.

[196] See notes 4-10 and accompanying text supra.

[197] Presidential involvement in independent agency rulemaking is less defensible. One would not expect the President to intervene in FCC license allocation decisions or even in rulemaking proceedings where the issues at stake are similar to those in *Home Box Office*. As has been suggested earlier, Congress may have selected independent agencies as a decision vehicle in order to avoid some degree of White House coordination. See note 136 and accompanying text supra. Thus the role of the courts in scrutinizing the whole record may be greater in these situations. As a practical matter, however, the President is not likely to intervene actively in independent agency policymaking.

[198] Although White House staff may not have as crucial a timing problem as the President, they still may desire the benefit of a completed rulemaking record before reviewing or setting administrative policy.

If one accepts the full implications of *Hercules, Inc. v. EPA*,[199] it may be more difficult to justify the idea that executive agencies are all part of a policymaking team centered in the White House. *Hercules* carved out what appeared to be a limited exception from *Home Box Office* for intra-agency ex parte contacts. The contacts were between the EPA judicial officer who presided over the rulemaking proceeding and members of the EPA legal and scientific staff who had appeared before her.[200] The court reluctantly permitted the contacts, because they were undertaken in good faith to assist in understanding the record.[201] The court avoided *Home Box Office* by holding that it did not apply retroactively, deferring the larger issue of its impact upon future ex parte communications.[202] Since the APA's strictures against ex parte communications do not apply to informal rulemaking or to intra-agency contacts,[203] it is a matter of debate how far the courts should go in mandating an equivalent judicial protective device.

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[199] 598 F.2d 91 (D.C. Cir. 1978). The EPA had established regulations limiting discharges of two toxic substances into the nation's waterways. The proceeding was conducted pursuant to § 307(a) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1317(a) (1976). The act calls for "on the record" determinations, which trigger formal rulemaking procedures under the APA. As the court noted, the rulemaking involves "categorical" or policy determinations, not individual or local determinations. 598 F.2d at 106. Thus, it is rulemaking in its "purest form," rather than valuable-privilege rulemaking.

[200] The EPA had changed its mind about permitting staff assistance, adopting a new regulation to replace an ex parte contact rule that had been applied to separate staff from the decisionmaker. See 40 C.F.R. § 104.14(a) (1976), superseding 40 C.F.R. § 104.16 (1975).

The chief judicial officer, Harriet B. Marple, submitted an affidavit to the reviewing court listing her contacts with agency legal staff and with staff experts. 598 F.2d at 121.

[201] Id. at 127.

[202] The court stated:

> Notwithstanding our decision, however, we feel compelled to record our uneasiness with one aspect of this case—the communication between Ms. Marple and EPA staff legal advocates (Mr. Hall and Ms. Chang). The fact that the attorneys who represented the staff's position at the administrative hearing were later consulted by the judicial officer who prepared the final decision possibly gives rise to an appearance of unfairness, even though the consultations did not involve factual or policy issues . . . .
>
> Amendatory legislation may be justified if agencies do not themselves proscribe post-hearing contacts between staff *advocates* and decisionmakers in formal rulemaking proceedings, lest there be an erosion of public trust and confidence in the administrative process.

Id.

[203] See 5 U.S.C. §§ 544(d), 557(d) (1976). The Senate and House reports state, with respect to § 557(d), that "[C]ommunications solely between agency employees are excluded from the section's prohibition." S. Rep. No. 354, 94th Cong., 1st Sess. 36 (1975); H.R. Rep. No. 880, 94th Cong., 2d Sess. 20 (1976).

Presumably the doctrine the courts evolve for intra-agency contacts will also be extended to executive agency contacts with White House staff. Even under a concept of collaborative decisionmaking, White House staff arguably have no more freedom to make contacts privately than agency staff. Thus, the message the *Hercules* case should hold for the agencies is to note the presence of contacts with White House staff, and proceed to defend the rule on the basis of the record before the agency. *Hercules* is not the final word on this point, but it does counsel a cautious approach. It may be that the executive power under article II gives the President *both* the right to intervene and direct *and* the right to do so in private, whereas the same power gives the White House staff only the right to intervene and direct publicly. This *Hercules*-inspired compromise with article II accommodates the countervailing judicial need to review the record of the decision.

The purpose of whole-record review and the attendant ex parte contact restriction is to ensure that the courts are aware of the factual and policy basis for the rule and that all private contacts and documents pertaining to the rule are available for judicial evaluation. It also informs the courts of the extent to which the rule was subjected to postcomment discussion within the executive branch. It is not necessary for the purposes of whole-record review, however, for courts to know the details of every White House contact, including presidential ones. Any rule promulgated with or without White House assistance must have factual support in the record. That much the courts will guarantee, but they need not be omniscient to perform this role effectively.[204]

When private contacts are funneled through the White House or the agency, the court will inevitably look for them in the rulemaking record. "Conduit" contacts, oral as well as written, are included in the record in order to prevent one side in a policy debate from rearguing its position out of the earshot or view of other sides. Since the core of the ex parte contact restriction is directed at nongovernmental contacts, any system that does not ensure that such private contacts are recorded bears a heavy burden of justification. That, of course, is what *Home Box Office* is all about. But valid executive branch interests are not frustrated by a system that publicizes the conduit function.[205]

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[204] 204. This reasoning does not account for one troubling scenario of presidential involvement. Since all policy decisions are necessarily made within a "zone of reasonableness," it is possible for undisclosed presidential involvement, motivated by political considerations, to direct an outcome that is supported by the record (i.e., within the zone), but yet different from the outcome that would have been reached in the absence of presidential involvement. Cf. Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945) (holding that a conspiracy to fix rates within a zone of reasonableness could violate the antitrust laws). Within certain limits, in other words, the political process affects outcomes in ways the courts cannot police. Perhaps the best answer to this is simply to recognize that politics is as much part of rulemaking as it is of legislation. Despite the presence of the APA, it is not intended that the courts convert informal rulemaking into a totally "rational" process, unaffected by the presence of presidential power.

[205] 205. The Justice Department's advice to Secretary Andrus and the CEA concerning the recordation of private contacts appears to be a sound rule for the courts to follow as well. See Department of Justice Memorandum, supra note 18. While the strip mining rule was under consideration, the Department suggested, and the CEA accepted, a responsibility for logging all private contacts. The CEA also agreed to place all documents received from private parties in the rulemaking record. See text

With these qualifications, *Home Box Office* and *Hercules* have some relevance to the restriction or recordation of presidential contacts in rulemaking. But they are far from being the guiding precedents for all executive branch activity. *Hercules* must be read in an expansive manner to render it persuasive on the appropriate scope of White House contacts. Ultimately, restrictions on informal rulemaking are better left to congressional resolution, a prospect with which even the *Hercules* court does not quarrel.[206]

U.S. Lines, on the other hand, appears to have more vitality on the question of the scope of White House involvement. It suggests that in informal adjudication, the right of the President to intervene off the record is considerably circumscribed. Even direct involvement by the President may be subject to recordation, because the concept of executive privilege introduced in *United States v. Nixon* can be limited by due process interests implicated in adjudicatory proceedings.[207] There is no inherent executive power to control the rights of individuals in an adjudicative setting.

In summary, the judicial role in controlling White House ex parte contacts involves the application of *U.S. Lines*, with some limited room for *Home Box Office* and *Hercules*. These cases may apply, with modification, to presidential intervention in independent agency rulemaking or White House staff intervention in executive agency rulemaking. But direct presidential intervention in executive agency rulemaking should remain free from judicially imposed record requirements.

V. A CRITIQUE OF PROPOSALS FOR REGULARIZING PRESIDENTIAL INVOLVEMENT IN AGENCY POLICYMAKING

Several proposals seeking to regularize the policymaking function of the White House are currently before Congress. Of particular interest is a plan, sponsored by the Commission on Law and the Economy of the American Bar Association, to give the President the ability to change policies created by agency rulemakings.[208] In addition, a bill introduced by Senator Culver would explicitly exempt the White House from ex parte contact restrictions,[209] and one introduced by Senator Kennedy would have the opposite effect.[210]

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accompanying notes 21-23 supra. There is no reason why a court should not impose similar standards upon the rulemaking record as part of its function on judicial review.

[206] See 598 F.2d at 127-28.

[207] See text accompanying notes 90-93 supra.

[208] See ABA Commission on Law and the Economy, Federal Regulation: Roads to Reform ch. 5 (1979) [hereinafter cited as Federal Regulation]. A bill embodying the ABA proposal has been introduced by Senator Roth. See S. 1545, Accountability in Regulatory Rulemaking Act of 1979, 96th Cong., 1st Sess. (1979).

In the interests of full disclosure, the author should note that he served as a consultant to the Commission, but his efforts were confined to chapter 6 of the Report. The discussion herein deals only with chapter 5.

[209] S. 2147, The Regulatory Flexibility and Administrative Reform Act of 1979, 96th Cong., 1st Sess. (1979), reprinted in 125 Cong. Rec. S. 19040 (daily ed. Dec. 18, 1979).

[210] S. 1291, The Administrative Practice and Regulatory Control Act of 1979, 96th Cong., 1st Sess. (1979).

A. *The ABA Proposal*

In its important book, *Federal Regulation: Roads to Reform*,[211] the ABA Commission on Law and the Economy proposed a statute authorizing the President to require executive and independent agencies to reconsider or modify regulations that the President finds significantly affect other national interests or statutory goals.[212] The proposed statute would contain subject-matter limitations and procedural safeguards and preclude intervention in licensing or ratesetting proceedings. In addition, it would allow time for Congress to react to presidential directives. It would not disturb existing standards of judicial review.[213]

Inspired by the need to enhance presidential accountability for agency policymaking,[214] this recommendation seeks to provide the President with a forcing mechanism to ensure uniform policy on "critical" national issues.[215] The President is given the power to require executive and independent agencies to consider or reconsider an actual regulation within a specified period of time. If such reconsideration does not take place to the President's satisfaction, the President is free to direct the agency to modify or reverse its decision.[216]

The grant of substantive power to reverse agency policy is cabined by an elaborate procedural structure. Before taking action the President must set forth by executive order in the Federal Register his findings on the questioned action or inaction by the agency involved.[217] Before ordering a modification or reversal, the President must provide a thirty-day written comment period. All comments become part of the public docket, which is designed to include all ex parte contacts between the President, his staff, and interested private persons, as well as discussions between the President, his staff, and the affected agency staff. On this latter point the Commission seeks a compromise, suggesting "that the occurrence of any meeting or discussion . . . be placed in the record, but that the substance of the discussion remain private for the same reason that intra-agency discussions remain private—in order to encourage a full and frank exchange of opinions and advice."[218]

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[211] Federal Regulation, supra note 208.

[212] Id. at 79-80. See generally Note, Delegation and Regulatory Reform: Letting the President Change the Rules, 89 Yale L.J. 561 (1980) (concluding that this resolution contemplates a "dangerously broad delegation").

[213] Federal Regulation, supra note 208, at 80.

[214] The recommendation is based on an earlier proposal by Lloyd Cutler, a member of the Commission, and David Johnson. See Cutler & Johnson, Regulation and the Political Process, 84 Yale L.J. 1395 (1975).

[215] "Critical" regulations are defined as those with "major significance to the national interest" and to the achievement of one or more statutory goals in addition to the statutory goal primarily entrusted to the initiating agency. Federal Regulation, supra note 208, at 80.

[216] Id.

[217] The President's power is derivative. No presidential order could require modification or reversal unless the agency itself had the power so to act. The President would also be bound by an agency's findings of basic fact. See id. at 81-82. Congress is also given a stated time to modify the President's proposed modification or reversal order. If Congress so acts, the President may withdraw his order. Id.

[218] Id. This approach is also followed in the Commission's related recommendation 4, which proposes that the executive branch require review of proposed regulations. Id. at 87.

The Commission's compromise plan seems calculated to gain the support of no political group. While it postulates a statutory grant of clear power to determine policy in the President and his staff, it limits that power in a substantively restrictive and procedurally burdensome manner. Moreover, it may actually offer the President less power over executive agencies than he currently enjoys under article II.[219] Conversely, some members of the Commission and of Congress believe the Commission went too far in granting the President the restricted reversal power that emerged from the recommendation.[220]

The provision restricting ex parte contacts bears further analysis. Although it tries to accommodate conflicting views on White House involvement in the agency decision process, it suffers from the defect of requiring the same public declarations of contacts from the President as from his staff. Arguably, the President has a greater interest in protecting both written and oral communications with cabinet officials from disclosure. Moreover, the concept of executive privilege expounded in *United States v. Nixon* seems to assure the President privacy in communications of this kind. In effect, the Commission proposal seeks to have the President waive some of his inherent power over "critical regulations" in order to achieve a congressionally sanctioned policy control device. Critical regulations, however, do not encompass all executive agency policymaking, and thus the scope of the proposal is not necessarily coextensive with executive privilege in this field. A situation may arise where the President retains his general off-the-record prerogatives while still exercising the limited on-the-record jurisdiction over critical regulations contemplated by the Commission proposal.[221] It seems doubtful that any President would want to accept such a dangerous duality of policymaking control, because it may lead to a reinterpretation of the shifting contours of the executive privilege doctrine.

As for the Commission's proposal on restricting the ex parte communications of White House staff, the notation of meetings with agency staff does not force the President to concede any power under article II. As discussed earlier, the President must be able to delegate duties to staff in order faithfully to execute the laws. But the staff need not have as grand a cloak of privacy to do its job effectively. If Congress can require specific delegations in writing, it could presumably require the recordation of contacts. By keeping the substance of those contacts private, article II interests are adequately protected. Thus, the ex parte contacts provision may form the basis for a modification of existing practice even if the Commission's overall proposal fails to become law.[222]

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[219] Of course, the inherent executive power in article II cannot be modified by the proposal. But if the President acts pursuant to the Commission's plan, he may as a practical matter have foregone his right to act differently on other regulations. Since the independent agencies do little of the truly controversial policymaking, which is usually in the areas of energy, environment, and health, there is more to be lost than gained if the President's freedom to control executive agencies is procedurally circumscribed.

[220] Four of the Commission's 26 members dissented from recommendation 3. The tenor of the dissents was fear of a politicization of agency rulemaking where "political payoffs" might be more the reality than political accountability.

The Senate Governmental Affairs Committee, chaired by Senator Ribicoff, has introduced a major administrative reform package that intentionally omits the Commission proposal for presidential accountability. See S. 262, Reform of Federal Regulation Act of 1979, 96th Cong., 1st Sess. (1979).

[221] The Commission proposal specifically notes that it "would not alter any other existing presidential power derived from the Constitution or other laws." Federal Regulation, supra note 208, at 83. Moreover, the expectation is that the President will invoke the critical regulation power only three or four times a year. Id. at 84.

B. *Ex Parte Contact Proposals*

Congress has before it several bills to reform the APA, at least two of which include sections dealing with ex parte contacts in informal rulemaking. Senator Kennedy has introduced a bill extending ex parte restrictions to informal rulemaking without differentiating in any way between White House and private contacts.[223] It goes beyond the Commission proposal by requiring that written comments and the substance of all oral comments be included in the record.[224] The Kennedy bill simply extends ex parte restrictions from the formal to informal process without qualification. A bill introduced by Senator Culver takes a dramatically different approach. It proposes a new section of the APA on "open communications in informal rulemaking" that explicitly excludes communications within the government, whether or not emanating from the White House, from any restrictions.[225] It is in effect a legislative private contact rule of limited scope.[226]

The Kennedy bill would legislate a full application of *Home Box Office* to all government officials, including those in the White House and the President himself, without any recognition of the distinctly different interests represented by those "outsiders." This approach stands on no better policy footing as a legislative recommendation than it does as a judicial extension of *Home Box Office*. It fails to come to grips with the valid institutional concerns that distinguish the White House from a private participant in the rulemaking process.

The Culver bill, on the other hand, makes a blanket legislative assumption that communications within the government are perforce among insiders. It also in effect overrides cases like *Hercules, Inc. v. EPA*, which try to restrain contacts between officials within an agency, by discarding the concept of qualified agency insider introduced by *Hercules* in favor of a blanket rule for both intra- and inter-agency contacts. One might question whether this approach ignores more subtle differences between government and private contacts. For example, the bill fails to account for the "conduit" possibility: it appears to approve a contact between a private person and a government official that is in turn transmitted from that official to the agency official involved in rulemaking.[227] Even the present administration, which generally favors a maximally permissive ex parte contact rule, has accepted the conduit restraint. Thus, the Culver bill is more liberal on ex parte communications than appears necessary to protect legitimate article II interests.

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[222] The proposal does not deal separately with the conduit problem, but that is probably unnecessary so long as it is construed to include all comments on a particular presidential intervention, whether privately or governmentally inspired. This is the approach taken in the Roth bill. See S. 1545, supra note 208, § 604(c).

[223] S. 1291, § 103, 96th Cong., 1st Sess. (1979) (proposing a new § 553a of the APA).

[224] The only exception is for documents exempt from mandatory disclosure under the FOIA. Id. § 103a. This exception would presumably give some small protection to presidential documents, but not those likely to be circulated in connection with domestic policy coordination.

[225] Proposed § 553a(a)(2) states in relevant part:

> The term "outside communication" means an oral or written communication between an agency official and any person outside the Government which is not on the record and which is relevant to the merits of a rulemaking proceeding for a rule determined to be a major rule under section 621 of this title . . . .

S. 1291, § 103.

[226] It only applies to major rules, which the Culver bill proposes to conduct pursuant to "hybrid" rulemaking procedures. See S. 2147, § 621. The bill is also limited in that it renders the ex parte restrictions inapplicable unless prejudice can be shown on review:

> Upon review, no court shall hold unlawful or set aside any agency action on the basis that this agency failed to comply with the provisions of this section unless (1) the outside communication involved in such failure presented data, views, or arguments which the agency significantly relied upon in promulgating the final rule and (2) the parties to the proceeding had not been given reasonable notice of such data, views, or arguments.

If, however, one had to choose between these two alternatives, there is little doubt that the Culver provision would do less damage. The decisional risks of the conduit problem appear far less serious than the prospect of cutting off all private communications between the President and his agency subordinates. Indeed, that aspect of the Kennedy bill as applied to executive officials might brook serious constitutional challenge should it be enacted.[228]

Of course, there are alternatives other than the two formulated here. It is possible simply to do nothing legislatively and let the present state of the law, with all of its unanswered questions, control outcomes for the future.[229] This course of nonaction is not without merit. It allows the issue to be ventilated and gives the courts an opportunity to structure the constitutional issues more clearly. But its drawback is obvious: it prevents a clear and prompt resolution of the matter, thus frustrating or inhibiting the executive branch and the agencies. Until the cloud on ex parte contacts is lifted, many agency officials, especially those in the independent agencies, will be uncomfortable with White House involvement and will resist presidential influence. It is therefore desirable to develop a workable ex parte contact rule from the various interests that have been advanced.

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[227] It would be possible to read the phrase "any person outside the government" as applying to such a person whether or not the communication is "laundered" by contact with an intervening White House official. But there is certainly nothing in the currently available legislative history that would support this interpretation. See 125 Cong. Rec. S19,060 (daily ed. Dec. 18, 1979) (section-by-section analysis).

[228] The argument would be that *Myers* and *Nixon* apply the concept of executive privilege to policymaking relationships with executive agency officials.

[229] This seems to be the approach taken by other administrative reform bills, which do not address the ex parte contacts issue. For example, the bill introduced by Senator Ribicoff, S. 262, see note 220, supra, was silent on ex parte contacts. Since this bill was preceded by one of the most comprehensive committee reports ever produced in the field of administrative reform, its silence should not be taken lightly. See Senate Comm. on Governmental Affairs, Study on Federal Regulation, 96th Cong., 1st Sess. (1979) (Vols. I-VI).

On May 8, 1980, the Senate Judiciary Committee agreed on an amendment to S. 262 that was substituted for the ex parte contacts provision of the Culver bill. The provision reads as follows:

> (f) Within one year after the enactment of this legislation, each agency shall conduct rule making proceedings in accordance with section 553 of this title to consider procedures for dealing with ex parte communications in informal rule making proceedings.

S. 262, § 201(f). This amendment seems to defer the ex parte contacts issue; it certainly does not resolve it, because agencies are likely to take a variety of approaches to the problem, including the question of whether the White House should be included within any proposed restraints.

VI. RECOMMENDATIONS

The preceding discussion demonstrates that extending ex parte contact principles to the White House is not to be undertaken lightly. It is far from obvious that ex parte principles should be extended to informal rulemaking in any event,[230] but even if they are, there are sound institutional reasons for distinguishing between presidential and private contacts in the rulemaking process. The President cannot logically be held to the same standards as private persons for participation in the informal rulemaking process. Any limitations on off-the-record contacts by the President should be applied cautiously. Such limitations should apply principally to independent agencies; they should relate only to informal adjudication or valuable-privilege rulemaking, not to "pure" informal rulemaking; and they should focus on contacts between private interests and White House staff that affect the outcome of rulemaking. These principles should form the basis of any legislative, judicial, or administrative solutions to the problem of presidential intervention.

If Congress desires to legislate on the subject, it could adopt the Culver Bill without any danger of interfering with the executive function. The bill exempts all "government officials" from the ex parte contact provisions and thereby grants the President and the White House staff unrestricted access to agency policymakers. On the other hand, if Congress wanted to modify the Culver Bill, it could do so without necessarily trampling upon article II interests. Such modifications might proceed along the following lines. Ex parte contact restrictions could be extended to written, rather than oral, contacts by government officials other than the President.[231] Written comments received by White House staff directly from private parties should also be included as part of the rulemaking record.[232] This approach follows part of the proposal suggested by the ABA Commission on Law and the Economy. Written contacts should be made part of the record because they are likely to be substantive in nature and could affect the outcome of the rulemaking. There should be no requirement that these written contacts be submitted in accordance with the timeframe established for public comment, but they should be placed in the record before the rule is finally promulgated.[233] Limiting contacts to the public comment period would reduce the value of public comments to the agency and to the executive branch. Post-comment contacts are important precisely because they are informed by the comment process itself.

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[230] See generally Scalia, *Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court, 1978 Sup. Ct. Rev. 345; Scalia, The Judicialization of Standardless Rulemaking—Two Wrongs Make a Right, 1 Regulation 38 (July/Aug. 1977).

[231] Whether the President's written contacts can be covered is a close question. On the one hand, most of the jawboning that is likely to occur with his subordinates will be done on an informal, oral basis. One would surmise that written communications are more prone to be substantive and therefore more logically part of the rulemaking record. There is certainly the possibility, however, that a President may want to send a sharp note of displeasure to a subordinate that he would want to keep private.

[232] See, e.g., the CEA procedure, discussed in note 205 supra.

The treatment of oral contacts by the President is a more difficult issue. If the article II privilege is to have any meaning, the substance of such contacts should be outside the record. Moreover, the fact of the contact itself may have to be private so as not to distort the exercise of the President's coordination power.[234] Oral contacts by White House staff should also be privileged, but the privilege should not attach to the same extent as it does for the President. The substance of such contacts should be shielded from scrutiny because it will be difficult to describe them explicitly without, in effect, requiring another "record" to be made.[235] White House staff are likely to meet repeatedly with agency officials to discuss the public comments and the decision rationale behind critical regulations, rendering it extremely difficult to isolate the substance of White House staff discussions from discussions within the agency itself.

The privacy interests implicated by recordation of White House staff contacts with the agency can yield without greatly disrupting the coordination powers of the Presidency. The compromise suggested by the Commission on Law and the Economy with respect to recordation of oral contacts may be the best way to resolve the competing interests.[236] So long as such notations are limited to White House staff contacts, the President should have sufficient flexibility to intervene privately, and the courts can still evaluate the relevance of White House involvement to the decision process.[237]

These restrictions are not inconsistent with a strong view of the President's power to coordinate agency policymaking. Congress must recognize that regulation of direct presidential contacts is as much a restraint upon its own control over executive agency policymaking as it is upon the President's control. Unnecessary formalities will frustrate presidential accountability efforts, thereby depriving Congress of a ready ally in the fight against an increasingly unaccountable bureaucracy.

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[233] There is precedent for this delayed creation of a rulemaking record by the insertion of relevant documents after the close of the public comment period. The 1977 Clean Air Act amendments define the "record" as follows: "All documents which become available after the proposed rule has been published and which the administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability." 42 U.S.C.A. § 7607(d)(4)(B)(i) (Supp. 1978). The statute also makes clear that the rule must be based on data received in the docket by the date the rule is promulgated. See id. § 7607(d)(6)(C). This date has been interpreted to mean the date the final rule is signed by the Administrator and released to the public, not the date on which it appears in the Federal Register. See American Petroleum Inst. v. Costle, 609 F.2d 20 (D.C. Cir. 1979).

[234] If the fact of contact were public, the President would have to weigh the attention such contacts would bring to a particular rulemaking proceeding. Where several conversations are involved, the cumulative impact might become a separate inhibiting consideration.

[235] The views of the *ACT* court are relevant here. The court speculated that it would ultimately have to require conversations to be recorded or administer a lie-detector test to determine if summaries are accurate. See Action for Children's Television v. FCC, 564 F.2d 458, 474 (D.C. Cir. 1977).

[236] See text accompanying note 224 supra.

[237] Even *Hercules, Inc.*, which expressed concern about the integrity of the decision process by contact between agency deciders and agency "advocates," accepted a recordation of contacts rule as satisfactory for judicial review purposes. See notes 199-202 and accompanying text supra.

But Congress is only part of the picture. Whether or not new legislation is forthcoming,[238] the courts reviewing informal rulemaking should cautiously apply cases such as *Home Box Office*, *U.S. Lines*, and *Hercules*, since they involve a variety of decision contexts other than informal rulemaking. The following factors may prove helpful in resolving particular cases: (1) Ex parte contact restraints should not apply when the President has a direct policymaking stake in the outcome of rulemaking; (2) The courts should be alert to the distinctions among pure informal rulemaking, informal adjudication, and valuable-privilege rulemaking, since the latter two are situations in which interests of due process and judicial review may override article II interests; (3) Off-the-record contacts by White House staff may not deserve judicial deference unless the President's involvement is made known through these contacts; (4) A decisional rule limited to requiring recordation of written rather than oral contacts by the White House staff may prove workable; (5) A recordation or even a publication rule limited to independent agency policymaking would run little danger of frustrating presidential prerogatives.

While there will undoubtedly be difficult choices to make in the future, these factors should assist courts in identifying the valid interests of the executive branch. Ultimately the judicial role in informal rulemaking review should respect the President's need to confer with and direct executive agency policymaking. The need for a record, important as it may be, should not override all other interests, including the principle that it is the President who must coordinate and direct agency policymaking as part of his article II duties and powers.

For the agencies the problem is most immediate. They seem to be responding well to the challenge of occasional presidential intervention in rulemaking. The executive agencies whose policymaking has attracted the most attention appear to be able to handle presidential oversight while still retaining final decisional authority. In the situations where they have been criticized for yielding to White House pressure, the agencies seem instead to have responded responsibly to an inherently difficult situation. It is never easy for administrators to receive policymaking guidance from outside the agency, but to reject executive branch involvement unilaterally is not a politically realistic course of action. At a time when no agency can be too confident of the correctness or economic impact of any policy choice in the areas of health, safety, or the environment, participation by the President and the White House staff seems desirable as well as inevitable. It would be foolhardy for an executive agency strictly to prohibit presidential ex parte contacts where no restriction is called for by Congress or by due process. Jawboning by the President is not something from which agencies any more than private industry have a right to be free.

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[238] If Congress does legislate on ex parte contacts by the White House, it should separately address the problem of judicial review. It would do well to include the harmless error concept introduced in the Culver bill. See note 226 supra.

**ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS**
WASHINGTON, D.C. 20544

July 30, 1981

Honorable William V. Roth, Jr.
Chairman, Governmental Affairs Committee
United States Senate
3306 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

In response to Congressman Danielson's request of May 11, 1981, the Judicial Conference transmitted its views on H.R. 746, S. 1080, and other regulatory reform measures to the Congressman on July 20, 1981. Pursuant to a later request from Senators Thurmond, Laxalt, and Grassley, the Judicial Conference views were transmitted to those Senators and the other members of the Judiciary Committee. On behalf of the Judicial Conference, I am enclosing that package of materials to assist your Committee on Governmental Affairs in your consideration of S. 1080.

Please do not hesitate to have your staff contact us if you have any questions on the positions taken by the Judicial Conference. Deborah Kirk in our Legislative Affairs Office may be contacted at 633-6040. Thank you for addressing the concerns of the judiciary in considering S. 1080.

Sincerely yours,

William E. Foley
Director

Enclosure

cc: All Members of the Senate Governmental Affairs Committee

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

July 24, 1981

Dear Senators:

Thank you for your letter of July 17 asking the Judicial Conference to convey suggestions concerning provisions in S. 1080 for possible consideration prior to completion of the Senate Judiciary Committee report to accompany the bill. While I regret the Conference not having been able to convey formal comments to you before the Judiciary Committee's meeting on July 14, we did not possess finally approved recommendations for transmission until late on the same day you wrote your letter.

I agree with your suggestion that our views might of been of value during your hearings. However, if we had been asked to provide comments for the one day of hearings devoted to judicial review provisions held by the Subcommittee on Agency Administration -- and we were not asked to do so -- we would not, in any event, have been able to respond to that request. The special ad hoc Committee on Judicial Review Provisions in Regulatory Reform Legislation, which the Conference authorized in March, was not able to formulate its final recommendations for Conference consideration until July 6. Those recommendations were then expeditiously distributed to the members of the Conference's Executive Committee, and the Executive Committee's decision was reached within days thereafter.

On Monday, July 20, William E. Foley responded to the House of Representatives' Judiciary Committee's May 11 request for comments by conveying the recommendations approved by the Executive Committee the previous Friday. A copy of Mr. Foley's letter to Congressman George E. Danielson, which includes Conference comments on provisions in S. 1080, as well as provisions in H.R. 746, is enclosed. The policy positions enunciated in that letter constitute the official views of the Conference.

On behalf of the Conference I thank you for considering those views as you complete your report. I assure you we are cognizant of the Judiciary Committee's primary jurisdiction over those provisions in S. 1080 upon which we have formulated recommendations. We will certainly, however, follow your suggestion that a courtesy copy of this material be provided to the Senate Governmental Affairs Committee.

Cordially,

Warren E Burger

Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Honorable Paul Laxalt
Chairman, Subcommittee on
Regulatory Reform
United States Senate
Washington, D.C. 20510

Honorable Charles E. Grassley
Chairman, Subcommittee on Agency
Administration
United States Senate
Washington, D.C. 20510

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

July 20, 1981

Honorable George E. Danielson
Chairman, Subcommittee on Administrative
Law and Governmental Relations
2265 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

In your letter of May 11, 1981, you requested the views of the Judicial Conference of the United States on H.R. 746. As I indicated to you at that time, the Judicial Conference was then in the process of considering H.R. 746 and other regulatory reform bills of the 97th Congress. In order to expedite the development and transmission of Judicial Conference views to Congress, the Judicial Conference in March of this year created a special ad hoc committee to consider the regulatory reform bills pending in Congress. That committee sent its report and recommendations to the Executive Committee of the Judicial Conference last week. Because the Judicial Conference meets only twice a year in March and September, the Conference has an Executive Committee authorized to act on behalf of the Judicial Conference on matters requiring action prior to a regularly scheduled session of the Judicial Conference. Due to the priority attention that H.R. 746 and S. 1080 are receiving in Congress, the Executive Committee has acted on behalf of the Judicial Conference in an effort to be responsive to congressional requests for Judicial Conference views.

The Judicial Conference addressed three distinct areas of concern:

I. The scope of judicial review of the administrative agency actions and the standards for such review;

II. The level of judicial review in the first instance in the federal court system; and

III. The proposed solution to eliminating the unseemly "race to the courthouse" in administrative agency cases

I. Scope of Judicial Review

The Conference first addressed its attention to the addition of the word "independently" (italicized) to Section 706(a) and to the language in the new Section 706(c) which precludes a "presumption in favor or against agency action." These sections are quoted below. The language of the existing section of the Administrative Procedure Act is in regular type; the additions made by S. 1080 are italicized. (The additions made by H.R. 746 to 706(c) are similar but presented in a different order.)

S. 1080

§ 706. Scope of Review.

(a) To the extent necessary to decision and when presented, the reviewing court shall *independently* decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

text deleted

706(c) In making determinations under clause (2)(C) of subsection (a) of this section, the court shall require that action by the agency is within the scope of the agency jurisdiction or authority on the basis of the language of the statute or, in the event of ambiguity, other evidence of legislative intent. In making determinations on other questions of law, the court shall not accord any presumption in favor or against agency action.

The Conference does not object to the use of the word "independently" in §706(a) nor to the use of the phrase "[no] presumption in favor or against agency action" in §706(c). The Conference recognizes the importance of preserving the judiciary's traditionally independent approach to questions of law. The Judicial Conference is concerned that the language employed in S. 1080 and in H.R. 746 will generate new cases and will require more extensive judicial analyses than Congress intends or is practicable for the federal courts to undertake. Without appropriate qualifying language in the bill itself or in its legislative history, the modifications to the Administrative Procedure Act will have an effect beyond that intended by Congress and risks imposing unmanageable burdens upon the judiciary. The bills, S. 1080 and H.R. 746, appear to apply with equal force to all questions that might technically be termed matters of law, including the thousands of minor, interstitial matters which Congress appears to have intended as appropriate subjects of agency expertise. Additionally, there will be cases in which issues of law and fact will be so intermixed as to defy any federal court's efforts to separate them. To apply literally this proposed language concerning the scope of review to all issues in all agency cases before the courts might require duplication of the agencies' decisions by the reviewing court. The committee questions whether Congress intended that in all agency actions the federal courts be required to undertake such a difficult and time-consuming, if not impossible, task. It appears inappropriate that the judicial review function become equated with complete oversight and redetermination of administrative agency decisions including factual decisions. Not only would such review be complex and technical in nature, but the scope of reveiw contemplated in these two bills would significantly increase the incentive to litigate agency decisons. The impact on the courts would be an increase in the number of administrative agency cases and a qualitative increase in the courts' workloads, given the breadth of matters before the courts, the depth of the reveiws, and the complexity of the matters subject to judicial review.

Position I.A.

> The Judicial Conference is concerned with preserving the independent review of questions of law in agency actions by the federal courts. However, the language used in S. 1080 and H.R. 746 to accomplish that objective overreaches that goal and creates an unmanageable burden for the federal courts. Without appropriate qualifying language, the Judicial Conference opposes the modifications proposed to ensure independent judicial review because the effect of the proposed language would exceed the objective intended by Congess.

If Congress believes as a matter of policy that judicial review is necessary, Congress could create a specialized Article I court or a group of such executive branch tribunals to perform such judicial review. The existence of such a court would avert the overburdening of the Article III courts with the many, routine appeals from agency decisions and rules. Appeal by certiorari from that court to an Article III court could, of course, be created for meritious cases. The Judicial Conference supported the creation of such a court for Veterans Appeals in the 96th Congress. The Judicial Conference Subcommittee on Federal Jurisdiction which met in June of 1981 recommends reaffirmation of that position. The subcommittee also recommends supporting a similar Article I court for the appeals of Social Security claims. The reason is clear, the federal courts cannot absorb the workload. The federal courts today, given their existing backlogged dockets and their limited resources, could not hear and decide in any reasonable period of time the cases which the judicial review provisions contained in S. 1080 and H.R. 746 would generate.

Position I.B.

> The Judicial Conference supports, as an alternative to direct review of administrative agency cases, the creation of an Article I executive branch court or courts with certiorari review by Article III courts.

The second major issue which the Conference addressed under the scope of judicial review was the modification of the Administrative Procedure Act to set a standard for judicial review of an agency's informal rulemaking under section 553. The Administrative Procedure Act currently provides no specialized standard of review for agency proceedings subject to section 553 of title 5. The proposed standards are as follows:

S. 1080

> (F) *without substantial support in the rulemaking file, viewed as a whole, for the asserted or necessary factual basis, as distinguished from the policy or legal basis, of a rule adopted in a proceeding subject to section 553 of this title; and* *

H.R. 746

> (F) *without substantial support in the rulemaking file, viewed as a whole, for the asserted or necessary factual basis subject to section 553 of this tile; or*

The Conference is concerned that the proposed language may blur the distinction between informal rulemaking (section 553) and formal rulemaking (section 554). The use of the phrase "substantial support" in S. 1080 and H.R. 746 is an improvement over the phrase "substantial evidence" which had been debated in the 96th Congress, but "substantial support" still tends to evoke an adjudicatory standard. Such a standard for informal rulemaking negates the Congressional purpose in establishing an informal process for creating, modifying, and repealing certain types of agency regulations. The Conference noted that there is an enormous number of minor regulations which are subject to the informal process and that there are comparatively few cases involving important rules with significant impact which are subject to this process.

A reviewing court needs the flexibility to address each case in a manner appropriate to the nature of the regulation considered, including assessing the suitability of the particular file in light of the particular regulation involved. The Conference reasoned that the Congressional intent in adding section 706(a)(2)(F) is to require support sufficient under the circumstances for the operation of the rulemaking process in a particular instance. The Conference believes that the phrase "adequate support" or the phrase "sufficient support" would better effectuate that intent than the phrase "substantial support" which appears in S. 1080 and H.R. 746. The Conference recognizes that the decision whether to add a separate standard for reviewing informal rulemaking is a matter of policy for Congress to address. Given the fact that Congress has inserted such a standard in S. 1080 and H.R. 746, the Conference feels that it is appropriate for the Judiciary to comment on the means by which Congress seeks to codify the requirement for support in an agency rulemaking file.

Position I.C.

> The Judicial Conference proposes alternatives to the phrase "substantial support" in section 706(a)(2)(F) such as "adequate support" or "sufficient support" because the use of the term "substantial support" blurs the necessary distinction between the informal rulemaking process and the formal adjudicatory process which requires "substantial evidence" on the record.

A third concern considered was the pending amendments to permit judicial review of agency decisions and agency regulatory analyses supporting those decisions. Such judicial review would be a review of the entire informal rulemaking file, a review of the analyses and data supporting the agency's decisions, and a review of the non-documented processes of decision-making in informal rulemaking (§553). Such matters are not the equivalent of a record in the sense that courts now review the records of adjudicatory agency proceedings (§554). (For example, these amendments would put Article III courts in the position of redetermining an agency's factual decision whether the $100 million impact level has been reached. The bills would also require the courts to analyze the analysis that the agency used to reach their decision.) Not only will the number of cases increase by creating such judicial review, but the time and expertise to make the review required will also increase dramatically. The Conference questions the ability of the federal courts to perform such a task effectively and quickly.

Position I.D.

> The Judicial Conference opposes the creation of judicial review of such agency determinations and the supporting regulatory analyses.

The fourth and final issue that the Conference considered pertaining to the scope of judicial review was the potential for "interlocutory" judicial review of agency decisions (e.g., whether to classify a rule as a major or minor rule). H.R. 746 (as introduced and as printed on June 8, 1981) explicitly precludes judicial review of an agency decision such as cited above (Section 632(a) p. 10 of the June 8, 1981, committee print of H.R. 746). S. 1080 is silent on the subject. Because there is concern that an amendment to create such judicial review may be offered, the Conference decided to address the issue.

The Conference opposes judicial review of agency decisions during the rulemaking process for several reasons. First, such "interlocutory" review by the federal courts would add cases to already overburdened federal court dockets, cases which might again be before that court on the merits of the rulemaking process. Second, the agency's initial decisions may not be well suited for judicial review at an early point in time given a potential paucity of information in the file combined with the technical nature of the regulation. Many cases could require remand. It is the Conference's opinion that reversals of preliminary agency decisions would occur only rarely. Also, judicial review at an early stage of the rulemaking process would require more discretion by the reviewing court than Congress may have intended. Third, due to the flood of civil cases coming to the courts and the existing backlog, these "interlocutory" reviews would not only overburden the federal courts, but they would also hinder the rulemaking process. Given that one objective of regulatory reform is to expedite agency rulemaking procedures, creating a certain delay by permitting premature judicial review of agency decisions conflicts with achieving that objective. Finally, this delay could be manipulated by either those making the rule or those challenging it. Furthermore, that same strategy could be applied not only to the creation of new regulations but also to the modification or repeal of existing regulations.

Position I.E.

> The Judicial Conference opposes efforts in Congress to create a right of judicial review for preliminary administrative agency decisions in the course of rulemaking.

II. Level of Judicial Review

H.R. 746 as introduced included the amendments to 5 U.S.C. §704. The text of the current section 704 is as follows:

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.
Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392.

The amendments proposed in the original version of H.R. 746 are as follows:

JUDICIAL REVIEW

Sec. 207. (a) Section 704 of title 5, United States Code, is amended--

(1) by inserting "(a)" immediately before "Agency"; and

(2) by adding at the end thereof the following new subsection:

"(b) If no special statutory review proceeding is applicable, an action for review of a rule defined in section 551(4) of this title shall be brought in the United States Court of Appeals, and venue of such action shall be determined in accordance with section 2343 of title 28, United States Code.".

The proposed addition to section 704(b) has been deleted from the June 8 committee print of the House bill. The Judicial Conference chose, however, to consider this issue and recommend a position because the proposed change may be offered as an amendment to the Senate bill or reappear during the House mark-up of its bill.

The effect of the proposed addition of 704(b) would be to direct all administrative agency cases absent special statutory provisions to the courts of appeals rather than to district courts. The Conference considered the comparative workloads of the district and the appeals courts as well as the nature of the administrative agency action reviewed (e.g., Social Security cases). The Conference believes that the status quo is preferable to the judiciary.

Position II.

> The Judicial Conference opposes adding a section 704(b) as proposed in H.R. 746 as introduced.

III. Race to the Courthouse

The Conference directed its attention to the solution proposed in S. 1080 to the problem of the "race to the courthouse." The provisions in S. 1080 (pp.22-24) substantially embody the proposal recommended by the Administrative Conference of the United States. To avoid unseemly action on the part of attorneys and to avoid inconsistent and contested actions by the various courts in deciding such matters of venue, the provisions in S. 1080 would amend 28 U.S.C. §2112 to provide for random selection by the Administrative Office of the United States Courts when multiple proceedings have been instituted. The Judicial Conference supports this proposal with the caveat that the random selection is viewed as a ministerial function not as a judicial function. Were it viewed otherwise, the Administrative Office would not be an appropriate agent to perform the selection. The Conference is concerned that no judicial functions be imposed on the Administrative Office by Congress. However, the Conference believes that the selection function contemplated in this bill is ministerial and administrative in nature.

Position III.

> As a matter of principle, the Conference opposes the imposition of any judicial function on the Administrative Office of the U.S. Courts. However, the Judicial Conference supports S. 1080's solution to the "race to the courthouse" problem with the qualification that the selection procedure is a purely ministerial duty. The Judicial Panel on Multidistrict Litigation with its staff may, however, be an alternative to the Administrative Office of the U.S. Courts as the agent administering the random selection process.

Sincerely yours,

William E. Foley
Director

[Follows Taylor 759]

CIVIL AERONAUTICS BOARD
WASHINGTON, D.C. 20428

IN REPLY REFER TO: B-1-35

SEP 10 1981

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Board has reviewed the Executive Board oversight provisions in S. 1080 as reported from the Judiciary Committee, as you asked. The Board has also looked at S. 400, S. 399, and S. 344, as you asked earlier in the year, all concerning regulatory reform.

We generally support efforts to reform the regulatory process to make it more responsive to both the Congress and the public. We believe, however, that the Executive Branch oversight provisions in S. 1080 are a serious encroachment on the independence of independent regulatory agencies such as the Board. We also have major reservations about some other aspects of S. 1080.

There are two forms of Executive Branch oversight in S. 1080 that include independent agencies. One is in new section 622, which would allow the President or a designee to determine an agency proposal to be a "major rule," triggering preparation of a regulatory analysis. Another oversight provision is in the new section 624. This section would give the President or a designee the authority to establish procedures for agency compliance with statutory requirements for analysis and periodic review of major rules. While such oversight is certainly permissible with respect to Executive Branch agencies, it impinges on the statutory independence of agencies such as the Board. As with Executive Branch review of independent agencies' reporting rules, there should be a mechanism by which such an agency may override a Presidential decision in these areas. Independent agencies are ultimately responsible to Congress, not the Executive. They should remain so. While the oversight involved here is on the surface procedural in nature, it could easily be used to frustrate or delay an agency's mandate from Congress to carry out the policy of its governing statute. We have no objection to requiring an agency to give the Executive Branch opportunity to review and comment on agency actions, as does the public, but without the change suggested above, the Board cannot support proposed sections 622 and 624 in S. 1080.

Another provision in S. 1080 that we find particularly pernicious—especially for the express goals of the bill—is the proposed section 553(b)(1)(E), which would totally remove from "the section," hence the entire notice-and-comment process, any rule for which the agency for good cause finds that full compliance with the notice requirements is unnecessary or may be reasonably delayed due to the insignificant impact of the rule. This loophole could easily accommodate a substantial percentage of all the actions that are now put out for notice and comment by agencies. The provision in this bill exempting from the notice requirement matters found of insignificant impact should be deleted, and the present language of section 553 ("impracticable, unnecessary, or contrary to the public interest") should be retained.

To my knowledge, it has never been suggested that agencies need not seek comment on new rules or amendments that they find of "insignificant impact." The notice of proposed rulemaking is really the most important element of the entire administrative process, the factor that forces agencies to seek advice and objections from the concerned public before they act, not after. An open process avoids the appearance of impropriety or the possibility of pushing through, as insignificant, regulations that work to the special advantage or disadvantage of particular groups. Even, as in the usual case, when an agency is acting in good faith, it is characteristic that policymakers consider much of what they do to be routine. It is equally characteristic that with the complex interrelationships created by government rules, some individual or group is adversely affected by any change. Moreover, adverse effects are not the only reason for requiring proposals before action; more often than not, the interested public points out detailed ways in which the rule as proposed is confusing, poorly stated, or simply could be improved. The courts have recently been strictly interpreting the notice requirement of section 553—requiring notice where it is at all possible—and that is desirable. The change in S. 1080 is thus unwarranted and could have an impact beyond its intent.

Our major criticism of the whole thrust of those parts of the bill, amending the rulemaking process, is that they will further overload the rulemaking process with analyses, statements, long and inflexible comment periods, and detailed documentary support requirements, and make the process more dilatory and cumbersome, more the province of the expert and less accessible to the concerned public. Since they burden only the rulemaking function, this procedure is likely to be avoided altogether by policymakers by the use of alternatives, like orders, policy statements, published opinions and interpretations, and case-by-case action. Thus, no government agency will be prevented ultimately from going ahead with its projects by these amendments, and many of the advantages of agency action by rule will be lost. In short, those provisions would unduly burden and distort the rulemaking process, while offering few if any offsetting benefits.

The requirement for cost-benefit analysis should not apply to those rules that deregulate, remove restrictions, or reduce burdens. By imposing detailed, formal analysis on such rules, deregulation could be impeded. These rules are by their nature less burdensome and costly than the status quo. At a minimum, there should be an exception for agencies acting under statutory mandates to deregulate, or for burden-reducing actions under defined criteria.

The three other regulatory reform bills on which you asked for the Board's comments are: S. 344, the Agency Accountability Act; S. 399, a bill to establish a regulatory budget; and S. 400, the Regulatory Conflicts Elimination Act. S. 344 requires an agency to publish an agenda of significant rules to be proposed or changed, and sets up a framework for Congressional veto of significant rules. The Board prefers the agenda requirement in S. 1080 because it is more definitive concerning the rules it applies to. S. 344's primary tool for Congressional review of rules is the joint resolution, which is legislative in nature, requiring the concurrence of both Houses and opportunities for Presidential approval or disapproval. Although the Board in general opposes a legislative veto on practical grounds as an independent agency, S. 344 is a significant improvement over the one-House legislative veto proposals of the past, both mechanically and constitutionally.

S. 399 sets up a mechanism for imposing a regulatory budget ceiling on the amount of compliance costs each agency may place on the private sector. The bill has a laudatory purpose, the focusing of agency and Congressional attention on the costs of compliance of regulations needed to implement Federal statutes. S. 399, however, goes too far. It sets up vague, simplistic across-the-board compliance cost ceilings as a method to cut government regulation. This is a poor and ineffective substitute for substantive regulatory review and mandated cost-benefit analysis as in S. 1080 and similar bills. Costs have little significance apart from a careful consideration of all benefits. If any proposal to make consideration of costs more meaningful is adopted by the Committee, the Board recommends it not be in the form of compliance cost budget as in S. 399. Instead, the Board recommends that statutory impediments to consideration of costs in adopting regulations be removed and that agencies be required to analyze the costs and benefits of their major actions.

S. 400, the Regulatory Conflicts Elimination Act, again has a worthwhile goal, but is flawed in implementation. The President is given authority to determine criteria to select rules that fall under the bill's procedures and to set criteria for examining the compliance cost of rules for use by all agencies, including independent agencies such as the Board. As with S. 399, we believe that such authority impinges on the statutory independence of the Board and similar independent regulatory agencies.

The bill further requires OMB to develop each year a report on those rules that are duplicative or in conflict. The agencies are then directed to report to Congress on recommendations to eliminate the duplication or conflict. If the Congress does not veto the recommendations in 60 days, they take effect. We believe that this procedure short-cuts the public notice and comment protections of the APA. Equally important, it does not address the basic problem of reconciling the responsibilities of different agencies to implement different, sometimes conflicting, Congressional objectives in the law. The goal should be to reduce the total burden of regulation. The mission assigned to OMB and GAO in the bill should thus be to coordinate agency rules to make them less conflicting or to eliminate duplication. The report to Congress should then contain the results and recommendtions for legislative change if needed.

I trust these general comments and summaries of our position on these bills are helpful. If you would like more detailed comment on specific provisions, we will be glad to work with you or your staff.

Sincerely,

[signed] Marvin S. Cohen
Marvin S. Cohen
Chairman

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

September 11, 1981

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

In response to your recent inquiry regarding S. 1080, a question has been raised regarding the independent nature of our agency. This subject, of course, is not contemplated by the draft legislation on which you sought Commission comments; however, we thought it would be helpful to provide the Committee with our views on this subject as you consider the upcoming legislation.

Now that the Commission is at full strength and our authorization process is complete, we believe that the Commission should continue as an independent regulatory agency as Congress intends. Since the new Chairman has been appointed, we have seen a spirit of cooperation and are hopeful that the full Commission will be able to fulfill effectively the mandate it has been provided by the Congress, and work toward solution of the problems aired during the authorization hearings.

We feel confident that the Commission can operate responsibly as an independent regulatory agency and we appreciate the opportunity the Congress has provided to us to demonstrate our success over the next two years.

Sincerely,

Nancy Harvey Steorts

Nancy Harvey Steorts
Chairman

Edith Barksdale Sloan R. David Pittle Sam Zagoria

Edith Barksdale Sloan
Commissioner

R. David Pittle, Ph.D.
Commissioner

Sam Zagoria
Commissioner

SEP 3 1981

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

September 1, 1981

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D. C. 20515

Dear Chairman Roth:

I welcome this opportunity to respond to your letter of July 30, 1981, to the Consumer Product Safety Commission requesting commentary concerning Section 624 of S. 1080, the Regulatory Reform Act. Since my personal views differ from those already transmitted to you by a majority of the Commission, I will get directly to the very point of difference.

For some time I have believed that the concept of independent regulatory commissions needs re-thinking. The structure of these agencies -- group leadership -- probably constitutes the single greatest impediment to effective regulatory performance. I am enclosing two recent commentaries I have prepared that go into considerable detail in supporting that conclusion. Critics of leadership by commission have consistently cited the failings of the group function, most pointedly a reluctance to formulate coherent regulatory policy and goals.

Without question, the obsolete organizational form of the independent agencies severely limits their effectiveness. Further, to the extent that regulation is to blame for our current economic quandary, some fault must be assigned to these agencies. The independent commissions, by virtue of their aloofness from an administration in power, lack a national perspective; none of them tallies the total effect of the many individual agency actions to assess the overall result. Yet, the sum of these separate actions - however well-justified on an individual basis - has had an immense and unanticipated impact on our economy and the American public.

Although some contend that replacing commissions with single administrators will mix politics with regulatory decision-making, I believe such risks are less worrisome than maintaining an inefficient government. As you know, today the President cannot ensure that all the key players in our government follow a consistent policy direction. The independent commissions, operating outside the scope of presidential policy-making, are insulated from national policy. It is impossible for a President to develop cohesive national policies and to influence major areas of governmental activity which impact on the economy -- for example, safety, transportation, and health -- when he is denied the necessary tools to do so. Unless some compelling reason dictates otherwise, a President should have sufficient authority to coordinate the activities of as many federal agencies as possible. In sum, we need to evaluate, on a case-by-case basis, the current need for the independent commission structure.

Such a review is likely to show that we may need to maintain the independent commission structure for certain particularly sensitive areas, such as those involving allocation of scarce resources. Those few areas would reflect a reasoned judgment that a very few select functions should be isolated, to some degree, from political considerations. The authority for Executive oversight in Section 624 may work at cross-purposes to that goal and could substantially weaken the unique independent nature of these few agencies. Further, the provisions in Section 624 are likely to be unnecessary for the small number of independent agencies in such a revised regulatory scheme.

I recognize that this letter discusses Section 624 in a somewhat theoretical manner, suggesting even more far-reaching changes than those proposed by that section. I would welcome the opportunity to meet with you or your staff to discuss these issues in greater detail.

Sincerely,

Stuart M. Statler
Commissioner

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

31 AUG 1981

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Chairman Roth:

In response to your request of July 30, 1981, I am pleased to provide the comments of the majority of the Consumer Product Safety Commission (Commissioners Pittle, Sloan and Zagoria) on section 624 of S.1080, the Regulatory Reform Act. For your information, I am separately providing my views on this section of the bill. Commissioner Statler will also be sending you his views on this section. Section 624 authorizes the President, or a specified delegate, to establish procedures for agency compliance with the provisions of the bill concerning regulatory analysis of major rules. The President would have the authority to monitor, review, and ensure agency implementation of these procedures. The procedures could apply to independent regulatory agencies, such as the Commission, as well as executive branch agencies.

While the Commission has in the past consistently supported regulatory reform efforts and has commented favorably on such provisions in earlier versions of S.1080, the Commission believes that the authority in the new section of the bill concerning Executive oversight could be used to substantially undermine the independent status of the Commission and other independent agencies. In establishing the Consumer Product Safety Commission, Congress provided in section 4 of the Consumer Product Safety Act (15 U.S.C. 2053) that the agency would be an independent regulatory Commission. The President or his delegate could potentially use the authority provided in this section to significantly influence the regulatory activities of independent agencies and remove control of regulatory actions from these agencies. In developing and monitoring compliance with these procedures, the President or his delegate could effectively veto certain regulations by withholding approval of the regulatory analysis. The President or his delegate could also extensively influence the rulemaking process by conditioning approval of the regulatory analysis on the making of specified changes to the regulatory proposal. The compliance and review procedures established by the President could also have a substantial effect on the timing of regulatory action, and could, in their implementation, lead to delay in such actions.

The Commission also believes that the provisions of section 624 are unnecessary in light of the provisions for Congressional veto of regulatory actions by the Commission under section 1207 of the Consumer Product Safety Amendments of 1981 (Pub. L. 97-35). In addition, Congress has in the past become actively involved in the oversight of Commission regulatory activities and, in the case of two products, lawnmowers and cellulose insulation, has directly affected the content of the Consumer Product Safety rules issued by the Commission.

The Commission strongly supports efforts to reform the regulatory process, including efforts to eliminate unnecessary regulations and efforts to ensure that regulatory action is undertaken after a careful consideration of the potential benefits and costs. As the Commission has indicated to your committee in comments on an earlier version of S.1080, efforts to assure rational, systematic, and cost effective agency decision making, to reduce delay in agency practice and procedure, and to provide for a review of agency rules, are useful and desirable. The Commission voluntarily complied, to the maximum extent possible, with former Executive Order 12044 and intends to comply with the spirit of Executive Order 12291. The kind of analysis that the Commission is required to perform under section 9 of the Consumer Product Safety Act (CPSA) (15 U.S.C. 2058) substantially meets the regulatory analysis requirements of section 622 of S.1080 as well as Executive Order 12291. Section 9(c) of the CPSA as amended (the Act) requires the Commission, before proposing a safety rule, to publish and solicit a preliminary regulatory analysis describing the potential benefits and potential costs as well as reasonable alternatives. The Commission must also evaluate the adequacy of voluntary industry standards to achieve the purpose of the proposed rule. The Commission must publish a final regulatory analysis before issuing a final rule. In addition to the provisions for regulatory analysis, the Act provides that before issuing a safety rule, the Commission must make specified findings about the impact of consumer product safety rules. The Commission is required to follow similar regulatory analysis procedures before issuing safety rules under the other acts it administers.

The Commission hopes these comments will be helpful to the Committee in its consideration of S.1080.

Sincerely,

Nancy Harvey Steorts

Nancy Harvey Steorts
Chairman

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

31 AUG 1981

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Chairman Roth:

I am pleased to provide my views on S.1080, the Regulatory Reform Act, and in particular on section 624 of the Act which authorizes the President or his delegate to establish procedures for agency compliance, including the compliance of independent agencies, with the provisions of the bill concerning regulatory analysis of major rules. The President would have the authority to monitor, review, and ensure agency implementation of these procedures.

I agree with my Commission colleagues' support of regulatory reform measures that ensure more cost-effective agency decisionmaking, as well as measures that promote more careful consideration of appropriate regulatory alternatives.

However, I cannot at this time agree with my colleagues' firm opposition to any clearance by the Executive Branch of Commission regulatory analyses. While I recognize that the Commission is an independent agency, and as such is a creation of Congress, it seems to me that Executive Branch review may be of substantial benefit to an agency in certain instances.

In recommending new regulatory analysis provisions, this Committee should consider whether they are necessary for the Consumer Product Safety Commission, which already has similar provisions in its own statutes. As you may be aware, the Commission's new legislation, the Consumer

Product Safety Amendments of 1981, requires the Commission, before proposing a safety rule, to publish a preliminary regulatory analysis describing the potential benefits and costs as well as reasonable alternatives to the rule. The Commission must also evaluate the adequacy of voluntary standards in achieving the purpose of the proposed rule. The Commission must also publish a final regulatory analysis before issuing a final rule. In addition to these requirements, the new legislation subjects Commission regulatory actions to Congressional veto.

I should point out that my appointment as Chairman began only very recently, therefore, over the next two years I expect to be in a better position to assess whether I believe Executive Branch review of Commission regulatory actions is needed. I am simply not prepared at this point to conclude, as the majority does, that such a review is necessarily inappropriate for an independent agency in all circumstances.

I hope these comments are helpful to you in your consideration of S.1080.

Sincerely,

Nancy Harvey Steorts

Nancy Harvey Steorts
Chairman

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

19 JUN 1981

OFFICE OF THE
GENERAL COUNSEL

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C., 20510

Dear Chairman Roth:

The Consumer Product Safety Commission is pleased to provide comments on S.1080, the "Regulatory Reform Act." The Commission has in the past supported and continues to strongly support regulatory reform efforts. The Commission believes that mechanisms to assure rational, systematic, and cost-effective agency decisionmaking, to reduce delay in agency practice and procedure, and to provide for review of agency rules are useful and desirable.

The Commission supports many of the reform mechanisms of S.1080. Certain provisions, however, which are discussed below, may benefit by clarification or revision. Our specific remarks on how the provisions of this bill will impact the Commission follow:

(1) S.1080 amends sections 551 and 553 of the Administrative Procedure Act (APA)(5 U.S.C. 551 et. seq.) to explicitly provide for emergency rules that may become effective on a temporary basis in certain situations without complying with the notice, comment, and delayed effective data provisions of the APA (5 U.S.C. 553(b)(B) and 553(d)(3).

The Commission supports the provisions in the bill that would allow agencies to issue emergency rules in an expeditious manner in order to prevent serious harm to an important public interest or class of persons.

The bill also amends section 553 of the APA to clarify the existing authority to dispense with the requirements for advance notice and an opportunity to comment. The bill provides that these requirements may be waived, for good cause, because of the routine nature of the matter or the insignificant impact of the rule. The Commission recommends that the bill be revised to retain the existing language in section 553(b)(B) of the APA that provides for a good cause exception based on a finding that notice and public procedure are impracticable, unnecessary, or contrary to public interest. In some situations either Congress or the courts may require that an agency publish a substantive rule without following the requirements for notice and public procedure. Where this occurs, the existing good cause exception is more flexible and would allow an agency to publish a regulation without following the normal rulemaking requirements.

(2) The bill would amend the informal rulemaking procedures provided in section 553 of the APA. Although the present law specifically provides that section 553 does not apply to matters relating to public property, loans, grants, benefits, or contracts, the amended section does not expressly state this conclusion. The Commission does not believe it would serve any purpose to subject these kinds of routine management activities to rulemaking, and therefore recommends that the bill retain the specific exclusions under present law.

(3) As in other regulatory reform bills, S.1080 contains requirements for regulatory analysis and regulatory agendas and calendars. The Commission is on record as supporting such requirements.

The Commission does not expect that the requirements for regulatory analysis for major rules as defined in the bill will substantially increase the administrative costs of Commission rulemaking. The Consumer Product Safety Act (CPSA) already requires the Commission to make significant economic findings and findings concerning alternatives prior to the time a rule is made final. Additionally, the Commission has recently proposed for public comment a rule (copy enclosed) setting forth its proposed methodology for the consideration of costs and benefits in the issuance of consumer product safety standards or bans.

As you know, the primary mission of the Commission is to protect the public against unreasonable risks of injury associated with consumer products. We support the requirement in S.1080 that a regulatory analysis explain why the rule attains its objectives.

(4) The bill would require notices of proposed rulemaking for major rules, as well as final rules, to include a description of reasonable alternatives for achieving the benefits of the rule. The Commission believes it is important to specify that the alternatives are reasonable ones, that is, alternatives under consideration that accomplish the rule's objectives, and not all possible alternatives. The most important factor in assessing the reasonableness of alternatives should be their ability to achieve the objectives of the rule. The bill also provides that the proposal specify alternatives that accommodate differences between geographic regions. This objective may be difficult for the Commission to achieve, since under the Commission's existing statutes, it is unclear whether the Commission has the authority to establish different regulatory requirements intended to address regional needs. Furthermore, we do not understand the bill to provide such authority.

(5) The bill would also require notices of proposed rulemaking for major rules, as well as notices for final rules, to include an explanation of the costs and benefits, except where the agency's enabling statute directs otherwise. The bill also provides that an analysis required by another statute may be included to the extent it satisfies or is not inconsistent with the requirements of the bill. As drafted, this section is unclear, since it could require the agency to exclude an analysis from the proposal where another statutory provision requires its inclusion. The Commission believes that this provision should be clarified to provide that the explanation of costs and benefits required by the bill would not have to be included where substantially the same analysis is required by another law. In addition, in those instances where a court or Congress requires the agency to propose a specific rule, the agency should not be required to include an evaluation of the costs and benefits of the rule.

This section of the bill would also require an explanation of how the benefits of the rule are likely to justify the costs, and an explanation of why the rule is likely to substantially achieve the rulemaking objectives in a more cost effective manner than the alternatives. In the case of many regulations involving health and safety issues it is not possible to reliably quantify many of the costs and benefits that stem from regulatory action. In the case of the Commission, the courts have recognized this by requiring that the benefits bear a reasonable relationship to the costs. (See Aqua Slide 'N' Dive v. CPSC, 569 F.2d 831, at 842 (5th Cir. 1978); Southland Mower Co. v. CPSC, 619 F.2d 499, at 523 (5th Cir. 1980). This test does not require the Commission to find that the quantifiable costs are outweighed by the quantifiable benefits, but instead requires the Commission to determine that the total benefits justify the costs. The Commission recommends that the bill be revised to reflect that a quantification of costs is not required in those cases where costs can not reliably be quantified. The bill should also be revised to specifically provide that in those instances where the most cost-effective alternative does not substantially achieve the rulemaking objectives, the agency is not restricted to the most cost-effective alternative if it provides a reasonable explanation of its rejection.

(6) The bill includes a provision that would allow an opportunity for cross-examination in the case of a major rule. Under the bill, there will be an opportunity for cross-examination only where interested persons request it to resolve material issues of fact, and only where other procedures for resolving these issues are considered inadequate. The Commission believes that the limitations on the opportunity for cross-examination are important. Because of the significant potential for delay presented by cross-examination in rulemaking proceedings, this practice should be the exception, rather than the rule, in agency rulemaking proceedings. In many cases, rulemaking issues can be satisfactorily resolved through the notice and comment rulemaking procedures. The agency should have a great deal of discretion in deciding whether cross-examination should be allowed in rulemaking under section 553 of the Act.

(7) The bill provides that a final rule must be published in the Federal Register not less than 30 days before its effective date, except in the case of rules that grant an exemption or relieve a restriction. Under present law, the

provision for a delayed effective date may be waived for interpretive rules and statements of policy or in other situations where the agency makes a good cause finding. The Commission believes that, as drafted, this provision is too restrictive, and recommends that it be revised to include the present exemptions.

(8) The bill would require final rules to be accompanied by a memorandum of law supporting the agency's determination that the final rule is within the authority delegated by the law and is consistent with congressional intent. The need for this provision is not clear, since the APA requires proposed rules to include a statement of the legal authority under which the rule is proposed. In addition, legal memoranda are, and should remain, in the status of internal advice between decisionmakers and their counsel. The bill would also require proposals to include a statement of the specific congressional intent that the rule seeks to achieve. The need for this provision is also unclear. If the agency's authority to issue a final regulation were challenged by persons commenting on the proposal, then the agency would address this issue in responding to the comments.

(9) S.1080 would require final rules to be accompanied by an explanation of how the factual conclusions on which the rule is based are substantially supported in the rulemaking file. The bill would also amend the judicial review section of the APA, section 706, to provide that the reviewing court must set aside agency actions whose factual bases lack substantial support. The bill appropriately recognizes that substantial support is required only for those factual conclusions that form the basis for the rule, and not for other factual conclusions that are of lesser importance. There may be regulations that are not based on factual conclusions, such as some interpretative regulations that are based on an interpretation of the statute. It is our understanding that the bill would not require agencies to explain factual conclusions for such regulations.

(10) The bill provides that an agency may not rely on any written material that was not identified in the proposal, unless the material was placed in the rulemaking file or notice and an opportunity to comment was otherwise given. This provision would appropriately allow agencies to rely on written material that is included in comments to the agency.

(11) The bill includes provisions for review of each major rule within a ten year period to determine whether the rule should be renewed, amended, or rescinded. The bill requires the agency to make available to the President or his designee a proposed schedule for the review of rules. The President or his designee may select additional rules to be reviewed. Schedules for the review of rules may be amended by the agency with the concurrence of the President or his designee. The agency must solicit comments on the proposed schedule and publish in the Federal Register a notice of proposed action for any rule being reviewed.

The Commission supports this periodic review of major rules in view of the significant impact such rules may have on commerce and the consuming public. The Commission believes that the bill should be clarified to provide that where an agency has already reviewed a rule in accordance with a statutory rule review provision, the rule need not be reviewed again under the bill. Under section 27(m) of the CPSA, the Commission has begun a rule review process intended to identify regulations that should be deleted or amended. The process has included an economic impact analysis that takes into account the costs and benefits of the rule, as well as a paperwork impact analysis. The Commission believes that the bill should be revised to provide that, in the case of the Commission , rule review should be coordinated with Congress, consistent with section 27(m) of the CPSA, rather than the President.

(12) S.1080 also amends the judicial review provisions in section 706 of the APA by instructing reviewing courts not to accord any presumption in favor of, or against, agency action in making determinations on questions of law other than those involving the agency's jurisdiction. The Commission's experience with respect to judicial review of its rules is that the courts do not generally accord undue deference to the Commission's determinations on questions of law or, on occasion, questions of fact. The Commission's determinations are subjected to close judicial scrutiny under the substantial evidence test of judicial review, and the courts have not hesitated to set aside regulations where the court concludes that the agency's burden has not been sustained. Accordingly, we do not believe this amendment to section 706 of the APA will substantially alter the scope of judicial review of Commission rules.

(13) S.1080 would amend the venue provisions of the U.S. code, 28 U.S.C. 2112, to eliminate the "race to the courthouse" aspects of the current venue provisions, in which persons seeking judicial review of agency rules in the courts of appeals attempt to file first in the court of their choosing. The bill would provide that where proceedings for review are filed in two or more courts of appeals within 10 days, the reviewing court would be chosen based on a process of random selection. The Commission supports this provision, and believes it will improve the fairness of the process of seeking judicial review. In order to minimize the elements of uncertainty and unfairness concerning the opportunity for judicial review, the Commission has taken steps to specifically designate the date of promulgation in regulatory actions subject to review in the court of appeals. The Commission's practice has been held to be reasonable by the courts. Southland Mower Company v. U.S. Consumer Product Safety Commission, 600 F.2d 12 (5th Cir. 1979).

(14) The bill also includes provisions for a regulatory agenda calendar of the rules that the agency expects to take action on in the next twelve months. Although the Commission supports requirements for regulatory agendas, it should be noted that under the Regulatory Flexibility Act (Public Law 96-354) agencies are required to publish regulatory flexibility agendas. We suggest, in order to avoid duplicative requirements, that S.1080 be revised to state that the regulatory agenda described in the bill may be combined with any other such listing required by law.

We hope these comments will be helpful to the Committee in its consideration of S.1080.

Sincerely,

/S/

R. David Pittle
Acting Chairman

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D.C. 20301

December 7, 1981

DEC 8 1981

Honorable William V. Roth, Jr.
Chairman, Committee on
Governmental Affairs
United States Senate
Washington, D.C. 20515

Dear Mr. Chairman:

The Department of Defense is concerned with the potential for several provisions of S.1080, as reported by the Senate Judiciary and Governmental Affairs Committee, to affect adversely the ability of the Department and the military services to discharge the national defense mission effectively. S.1080, a bill of the 97th Congress, would amend the Administrative Procedure Act, 5 U.S.C. §§551 et seq. (1976 & Supp. III 1979) to require regulatory review and analysis of all proposed and final agency rules. Further, it would expand the scope and standard of judicial review of agency action.

The proposed legislation largely incorporates in statutory form the current requirements of Executive Order No. 12291, Federal Regulation (Feb. 17, 1981). A threshold standard of cost-effectiveness would be established by statute as a condition precedent to the adoption of agency rules. An agency would be required to ascertain and consider the relative costs, benefits, and adverse effects of and reasonable alternatives to, any proposed major rule, as defined in the bill. Although mathematical precision in the agency rulemaking evaluations is not mandated, the bill requires the agency to make a "reasonable determination," based upon the rulemaking file considered as a whole, that the costs and adverse effects are justified by the benefits that would accrue under any proposed major rule, and that the cost-effectiveness of the rule exceeds the cost-effectiveness attributes of all proposed alternatives.

The Department of Defense objects to the proposed emasculation of the exemption of "military and foreign affairs" functions from the public notice and comment rulemaking requirements of 5 U.S.C. §553 contained in the Governmental Affairs version of S.1080. The scaled-down version proposed by the Governmental Affairs Committee would severely restrict the application of the exemption, limiting it to DoD and military service rules that pertain to a "military or foreign affairs function that is specifically authorized under criteria established by Executive Order to be kept secret in the interest of national defense or foreign policy." S.1080 §3, 97th Cong., 1st Sess. (1980)(Cal. No. 274, at 60).

The utility of the exemption, as amended, would be minimal at best; the great bulk of the rules issued by DoD and the services in fulfillment of their critical defense mission would be unnecessarily inhibited by a statutory rulemaking and regulatory review requirement. The expeditious issuance of rules at all levels of command would suffer as a consequence.

Although the Department intends to integrate the regulatory requirements of the recent Executive Order, which is the immediate predecessor of the subject bill, a statutory imposition of such costly and time-consuming prerequisites to promulgating effective rules will unnecessarily encumber the expeditious issuance of rules vital to the operations of the armed forces and the fulfillment of the national defense mission. The assurance of optimal levels of readiness and performance in the military services requires that the Department retain the option to dispense with impact analysis when, in its sole judgment, the command control, readiness, or mobilization requirements essential to national defense planning and deployment require such action. Absent this flexibility, the military and foreign affairs rulemaking exemption would be effectively emasculated.

Unlike those agencies concerned with regulating the non-defense public sector, the principal Department of Defense mission of national defense and security is not a component of a broader national regulatory plan to administer health, safety, welfare, or economic policies. The deregulation of the non-defense public sector is intended to counteract excessive costs of complying with a plethora of health, safety, environmental, natural resource, and economic regulations issued at the federal level. By contrast, the rules issued at the various component levels of the Department of Defense are only incidental to the conduct of their primary military and defense missions. The rules promulgated by the Secretary of Defense, the defense agencies, the military services, the major commands, and all subordinate components and commands, therefore, are necessary to the defense purpose and internal administration. Any impact on the public occurs merely as a consequence of this purpose.

Moreover, this unwarranted intrusion into the commander's domain would subject DoD regulations that are not intended to regulate the public, and the impact of which is only incidental to the execution of the Department's principal mission of national defense, to an inordinately burdensome review and comment cycle. Significantly increased litigation of the validity of military rules would also be invited.

The Department objects to any further erosion of the rulemaking exemptions other than the military and foreign affairs functions exemption. The Judiciary Committee's limitation of the personnel rules and practices exemption under an exclusivity requirement, constitutes an unworkable restriction that may serve to spawn unnecessary litigation and curtail the practical application of the exemption. The elimination of the agency management exemption and the restrictions imposed on the applicability of the personnel practice and procedure, interpretative rule and statement of policy, and the "impracticable, unnecessary, or contrary to the public interest" exemptions, poses undue inhibitions on an agency's ability to exercise its considered judgment to bypass the rulemaking process in the public interest on matters that do not have a substantial effect on the public. The result would be to constrict an agency's capability for conducting its own affairs and discharging its delegated functions by reducing the flexibility necessary to adapt to changing situations confronting the agency. While public scrutiny and participation in agency action generally is both desirable and necessary for a balanced agency approach to many multifaceted problems, the agency must preserve a degree of self-determination on matters of an internal nature.

Similarly, the Department opposes narrowing the "proprietary exemption" by superimposing Office of Federal Procurement Policy or General Services Administration requirements on DoD rules regarding defense procurement practices and procedures. Since S.1080, in the Department's view, is an inappropriate legislative vehicle for further defining the authority to prescribe defense procurement policy, the Department objects to this proposed impediment to adopting efficient acquisition, management and disposal practices. Significantly, the Department views the elimination of the "good cause" exemption as imprudent, in view of the variety of matters for which rulemaking would not serve public purposes effectively, but which do not squarely fall within the purview of some other exemption.

The Department further objects to the inclusion of the "Bumpers amendment," or any portion thereof, in S.1080. The amendment would require substantial support in the record, generally viewed as equivalent to "substantial evidence," for any necessary or asserted factual bases for an agency rule in order to survive judicial scrutiny. Moreover, the amendment would preclude, under the Judiciary Committee version, the judicial use of presumptions on questions of law regarding agency expertise and require a judicial determination independent of agency findings. The Department opposes any amendment which would foreclose judicial deference to agency expertise or subject informal rulemaking to a heightened standard of review beyond arbitrary, capricious, not in accordance with law, or abuse of discretion. Requiring or inviting judicial incursion into the decisions of military commanders, an area in which the courts consistently have been reluctant to become entangled, would constitute an injudicious approach to ensuring agency compliance with the legislative standards delegated by Congress.

The curtailment or elimination of judicial presumptions regarding the regularity, jurisdiction, authority, and expertise of agency action are inimical to the promotion of judicial economy and efficiency. The effect will be to require unnecessary offers of proof with respect to these elements. This would needlessly consume the courts' and the litigants' time, diverting limited agency resources into the already burgeoning activity of administrative litigation. The use of presumptions, furthermore, does not prevent the private litigant from introducing evidence sufficient to negate the presumption, thereby requiring the agency to establish all of the elements justifying its action.

The restrictions the bill imposes on the deference that a court may accord to agency expertise and interpretations of its own rules, and the presumption limitations, present unique problems to the Department of Defense and the armed forces. Unlike other agencies, the Department of Defense rulemaking power, and in particular, the military services, has its genesis in the constitutional powers of the President as Commander-in-Chief of the armed forces, as well as the congressional delegation of legislative functions. Military commanders, moreover, possess the inherent authority to provide for the health, safety, morale, welfare, and security with the command jurisdiction, independent of a legislative delegation by Congress or executive delegation under the Constitution. To the extent Department or military rules are based on a delegation of command authority distinct from Congress' relinquishment of authority, the intrusion of the commanders' prerogatives by judicial review must be kept to a minimum. Precluding the use of judicial presumptions, accordingly, is an unjustifiable interference with the military mission in that it would unnecessarily require the armed forces to substantiate the validity of their rules even in the absence of a credible challenge to the underpinnings of a rule.

Advocacy of judicial noninterference is congruent with the present judicial interpretation of the doctrine of nonreviewable military activities. In reviewing military administrative actions, traditionally the courts have exercised prudent restraint from interceding in matters legitimately in the military sphere. Underlying this restraint, among other things, is a reticence to entangle the courts in disputes involving areas specially vested in the services because of their peculiar expertise. Consequently, under the standards fashioned by the courts, military administrative actions are reviewable generally only in cases involving a lack of jurisdiction over the person; constitutional, statutory, or service regulation violations; or an abuse of discretion. The Department, accordingly, disagrees with the subject bill's proposals to apply a statutory standard of "substantial support in the record" to informal rulemaking, as importuning an unwarranted incursion into military activities.

The Department of Defense fully supports the efforts to reduce the costs and burdens of inefficient government regulation of the public sector. Moreover, the Department voluntarily undertakes to provide notice and request public comment on many of its proposed rules, notwithstanding the "military and foreign affairs" rulemaking exemption, and will continue to do so. We urge, however, that careful consideration be given to the national defense mission of DoD in the formulation of the Committee's position on S.1080, including the following:

- Application of the "military and foreign affairs" rulemaking exemption in 5 U.S.C. §553(a)(1) to rules that are published pursuant to agency regulation, and that are not required by statute to be published.

- Exemption of rules published pursuant to agency regulation, and not required to be published by statute, from statutory regulatory analysis and review requirements.

- Exemption of "military and foreign affairs" functions from any proposed amendments to the bill requiring congressional review or legislative veto of agency rules.

- Elimination of any provision that enlarges the scope of judicial review under 5 U.S.C. §706 to include agency hearings on the record that are not required by statute to be held on the record.

- Elimination of any provision that raises the standard of review for informal rulemaking conducted pursuant to 5 U.S.C. §553 to a standard greater than arbitrary, capricious, or abuse of discretion.

- Elimination of hybrid rulemaking procedures, including oral proceedings and cross-examination, as a mandatory part of the rulemaking process.

- Retention of the rulemaking exemptions for government procurement, personnel and agency management, interpretive rules and policy statements, and the good cause finding of unnecessary, impracticable, or contrary to the public interest.

Pursuant to the request of the Office of Management and Budget (OMB), the Department has provided its views on S.1030 to OMB. OMB has advised that, from the standpoint of the Administration, it does not object to the presentation of the views of the Department of Defense to the Committee.

Sincerely,

William H. Taft

William H. Taft, IV

THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

SEP 22 1981

The Honorable William V. Roth Jr.
Chairman, Committee on
Governmental Affairs
United States Senate
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request for our views on S. 1080, a bill "To amend the Administrative Procedure Act to require Federal agencies to analyze the effects of rules to improve their effectiveness and to decrease their compliance costs; and to provide for a periodic review of regulations; and for other purposes."

Because the issue of regulatory reform has been the subject of careful review by the Vice President's Task Force on Regulatory Relief, we defer to the views of the Task Force on S. 1080.

We are advised by the Office of Management and Budget that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

Secretary

U.S. Department of
Transportation

Office of the Secretary
of Transportation

General Counsel

400 Seventh St., S.W.
Washington, D.C. 20590

FEB 11 1982

The Honorable William V. Roth, Jr.
Chairman, Committee on Governmental Affairs
United States Senate
Washington, D. C. 20510

Dear Senator Roth:

The Department of Transportation would like to take this opportunity to present our views on S.1080, a bill

> To amend the Administrative Procedure Act to require Federal agencies to analyze the effects of rules to improve their effectiveness and to decrease their compliance costs; to provide for a periodic review of regulations, and for other purposes.

The version of the bill upon which we are commenting is the one introduced November 30, 1981, by Senator Paul Laxalt, as Amendment No. 640. It is a consensus version of bills reported by the Senate Committee on Governmental Affairs and the Senate Judiciary Committee.

The bill would make major changes to the informal rulemaking portions of the Administrative Procedure Act (APA) (5 U.S.C. Section 551 et seq). Additional requirements would be prescribed for notices and comment periods, for proposed rulemakings and for the issuance of final rules.

The bill would also require agencies to prepare and publish cost-benefit analyses on publication of proposed and final major rules. A major rule would be one which has an annual effect of $100 million or more on the economy, or which has other significant adverse effects in economic-related areas or on the environment, public health or safety.

In addition, the bill would require each agency to publish a regulatory agenda twice each year. This agenda would provide information on all rulemakings planned in the next year. Included in the required information would be a schedule for completion of the rulemakings. The President would also be required to publish a Calendar of Federal Regulations for all major rulemakings.

Under the bill, agencies would be required, within ten years, to review all existing major rules. This legislation would require the publication of review schedules and notices of reviews for comment.

Finally, the bill would alter the standard of review used by the courts to review agencies' decisions on informal rulemaking proceedings, incorporating a version of the "Bumpers Amendment." On the issue of venue, the bill attempts to eliminate race to the courthouse situations by providing for random selection of a Court of Appeals to hear a case from those courts where proceedings had been instituted within a specified period of time.

President Reagan's Executive Order on Federal Regulation (E.O. 12291, February 17, 1981) and other presidential directives have initiated a comprehensive program of regulatory review in the Department of Transportation and other Federal executive agencies. The Executive Order also provides for thorough analysis of the costs, benefits, and other impacts of each new regulation that the Department issues. In the Department's view, the President's program for Federal regulations has been working well and should be given a fair chance to continue and to be further refined, if necessary, before any of the comprehensive regulatory reform bills that are currently in Congress are enacted. The advantage would be that an Executive Order can be revised easily as experience dictates. Obtaining necessary changes in a statute would be much more difficult.

I have enclosed the Department's specific comments on provisions of the bill. As a general matter, however, I urge your Committee to look carefully at this proposal to ensure that it would not unnecessarily complicate and delay the regulatory process and the reform of existing regulations. Using appropriate regulatory techniques to achieve legitimate ends, such as ensuring safety in transportation and effective management of Federal grant programs, is a necessary and significant responsibility of Federal executive agencies. As the President's Executive Order provides, we have a strong obligation to ensure that the cost, benefits, and other impacts of regulations are taken adequately into account in the rulemaking process. If we burden the regulatory process with excessive paperwork requirements, redundant or unnecessary reviews, and new opportunities for dilatory and obstructionist litigation, the only result will be to delay the carrying out of legitimate governmental functions and to create multiple opportunities for the frustration of our achievement of legitimate governmental objectives. In seeking to reduce the unfavorable impacts of regulations upon the public, we should not create unreasonably burdensome requirements for the regulatory process itself.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to submitting these comments to the Committee.

Thank you for considering our views.

Sincerely,

John M. Fowler

John M. Fowler
General Counsel

Specific Comments on S.1080

Exemptions

The bill would eliminate from §553 of the Administrative Procedure Act the exemption from notice and comment procedures for rules pertaining to grants, loans, and benefits. The Department of Transporation typically uses notice and comment on its grant-related rulemakings. Indeed, the Department's Regulatory Policies and Procedures require notice and comment even where the APA does not, except where notice or comment would not be likely to result in meaningful public input. Consequently, the Department has not frequently used, let alone abused, the grant exemption. Nevertheless, there are circumstances in which we believe it is beneficial to have the flexibility to dispense with notice and comment if the situation warrants (for instance, in a non-emergency but urgent situation in which the essentials of interested parties' views are known, such as the Department's July 20, 1981 interim rule relaxing mass transit handicapped accessibility requirements, the "§504 rule," and ending the confusion caused in the mass transit community by a Federal court decision). As a result, we recommend that the grant exemption be retained in §553.

Notice and Comment

The revisions to § 553 would also subject to notice and comment procedures any interpretive rule or general statement of policy that has general applicability and would substantially alter or create rights or obligations of persons outside the agency. This language is very vague, and its ambiguity is likely to lead both to uncertainty in agencies as to what matters require notice and comment and to new opportunities for litigation.

Statutory Authority

Proposed 5 U.S.C. § 553(b)(1)(C) requires that each notice of proposed rulemaking (NPRM) contain an explanation of the "specific statutory authority under which the rule is proposed." S.1080 should be revised to clarify that Congress does not intend to require a specific statutory mandate or authorization for each individual rulemaking. We often have to rely on general statutory authorities or an Executive Order as the legal basis for a rulemaking.

Description Of Data Relied On

Proposed 5 U.S.C. § 553(b)(1)(F) requires a "description" of any data, studies, "methodologies," reports, scientific evaluations, etc., on which the agency will rely in the rulemaking to be put into the preamble for proposed rules. S.1080 should be revised to clarify what kind of and how detailed a "description" is required and what a "methodology" is. It should also be made clear that an agency is not required to use any such information in order for a rule to be valid. Generally, this provision seems to be one that could increase the size of preambles substantially without any significant benefits to the public.

60-Day Comment Period

Another area of concern relates to the proposed 60-day minimum comment period for all NPRMs required by proposed § 553(c)(1). Currently, the Department and other agencies have had occasion, for valid reasons, to publish NPRMs with short (e.g., 10, 15, or 30-day) comment periods. For example, the Department recently published an important regulatory relief amendment to its minority business enterprise rule after a 15-day comment period. The Department received over 400 comments to this NPRM. In this case, a short comment period was needed to respond to an urgent need to relieve an onerous regulatory requirement and to resolve pending litigation. There are also many safety regulatory actions where we do have time for a short comment period but not for 60 days. If such situations arise under the bill, the Department would have to choose between a 60-day comment period, which would delay urgently needed relief, or publishing the rule under proposed §553(b)(2), which would deny the public the opportunity to comment before the rule is issued. In many safety situations we may have no choice; we may have to provide no comment period. Statutory time frames may also restrict us.

In addition, there may be instances where a 30-day comment period on an advance notice and 30 days on an NPRM may be desirable but not possible if 60 days are required for the NPRM. It is important that agencies be allowed to retain the flexibility to respond to these kinds of situations while generally providing 60-day comment periods. This problem could be addressed by setting out in the statute certain criteria for expedited notice and comment rulemakings in appropriate situations. Agencies taking advantage of the expedited procedure could be required to publish in affected NPRMs a statement describing how the statutory criteria were satisfied.

Public Hearings

General

Section 553(c)(3)(A) of the bill mandates public hearings for major rules. Public hearings are expensive and can delay the rulemaking process; in many rulemakings, even major rulemakings, they are simply unnecessary. The requirement that a transcript of all hearings be prepared under proposed §553(c)(3)(B)(4) is another expensive, time-consuming requirement. All hearings should be made discretionary.

Direct and Cross Examination

The requirement of proposed §553(c)(3)(A)(ii) for an opportunity for direct and cross-examination at public hearings of agency employees and other persons (e.g., consultants) who prepared data for the rulemaking is especially troublesome. The opportunity for direct and cross-examination also extends to other persons who present information at the hearings.

Even if, under §553(c)(3)(B)(4), the agency limits direct and cross-examination rights to a few designated representatives, hearings could be lengthy and chaotic. For example, on the Department's §504 rule, representatives of the transit authorities, handicapped groups, and state and local governments could examine DOT employees and each other.

The potential adverse effects are numerous. An agency might not, for example, be able to use its best "rulemakers;" it would have to consider the individual's ability to express himself or herself clearly during oral testimony and to withstand cross-examination. The government and private parties would also need to use attorneys more than they do at present; many would probably prefer to use attorneys for direct and cross-examination and to "protect" them by making appropriate objections when they are questioned. In addition, many people who might not otherwise attend a hearing might have to testify if they prepared data used in the rulemaking. This would increase costs for the government, especially for hearings outside Washington, D.C.

The procedural ground rules for such hearings would have to be very detailed. They would have to determine, for instance, what rules of evidence were used, who the presiding officer would be and what powers he or she would exercise, who did direct examination and who did cross-examination (as between the agency and outside parties and among the outside parties), the basis on which representatives of parties with a common interest would be selected (and how it would be determined whether parties had a common interest), whether there would be time limits for presentations and questioning, what administrative appeals or rulings of the presiding officer to higher agency authority could be made, which agency officials (e.g., staff or principals) would have to submit to cross-examination, and whether officials from other government agencies (e.g., the author of a binding Executive Order) or non-government employees could be compelled to appear. Most important would be the rules on when to stop cross-examination (e.g., because of harassment or irrelevancy) and whether to allow such things as hearsay evidence. Such procedural rules would themselves be very time consuming to create, would be controversial, and would delay hearings and create additional opportunities for litigation on procedural grounds.

The whole point of having informal, §553 rulemaking is to permit agencies to carry out necessary regulatory activities without all the delays and formal procedural problems that attend formal, §554 rulemaking. This provision seriously erodes the distinction between the two kinds of rulemaking, and makes §553 rulemaking excessively formal in cases of major rules. Moreover, the cross-examination provision would give additional influence in rulemaking to interest groups able to afford counsel, and therefore reduce the influence of the general public's comments. It would make the rulemaking process more, rather than less, adversarial. By creating an adversarial situation, this legislation will make the government and private parties advocates rather than allowing them to retain a neutral posture where they so desire. This would be a special problem for the government. It will tend to create adversaries where cooperation may be important and where the government should be allowed to remain an objective decision-maker.

Judicial Review

Even given the limitations on judicial review of proposed §553(c)(3)(B), this provision would open numerous additional opportunities for collateral legal attacks on rulemaking and for the issuance of interlocutory orders by the courts to stop the rulemaking process in its tracks. The focus of judicial review should be on the adequacy and legal validity of the rule's substance, not on increasingly intricate questions of procedure.

Under the proposed judicial review procedure in §553(c)(3)(B), review is available only if someone files a timely objection to the procedure used by the agency (unless there are "extraordinary circumstances" to justify any late objection). It is uncertain whether the party filing the litigation must also have filed the objection in order to have standing to seek review. This important legal question should be clarified in the bill.

Docketing of Data Substantially Relied On

Proposed § 553(d)(2) prohibits agencies from substantially relying on any factual or methodological material that was not identified in the NPRM, unless such material was placed in the rulemaking file in time for interested persons to comment on it during the period for public participation on the rulemaking. Material can subsequently be placed in the rulemaking file if the agency intends to rely on it, but if the information is of central relevance to the proceeding, interested persons must be afforded an opportunity to comment on this material also. Although we generally place such material in the public docket, this provision, in the Department's view, would present a serious problem. The purpose of notice and comment is to allow interested persons to comment on the agency's proposed actions. Public comment upon studies or other data sources is not necessary for this purpose. The proposal should stand and fall on its own merits and the comments made upon it. Moreover, this provision could potentially lead to the development of an "exclusionary rule" in judicial review of agency rulemaking. Like the criminal who went free because the constable blundered, a substantively valid agency rule could be overturned on judicial review because the agency relied upon a piece of information upon which public comment was inadvertently not sought. Whatever sense the exclusionary rule may arguably make in criminal law, we see none at all in the rulemaking context.

Also, we are concerned that, often, there is so much data received by so many people within an agency that it is impossible to ensure that all data received and relied upon are included. In addition, this provision does not say what the agencies may or must do with the comments they receive on their sources of information, further leading to the conclusion that the comment process on these information sources is likely to be useless.

Rulemaking File

Proposed §553(f)(1) requires the agency to maintain an indexed rulemaking file. This file would be somewhat more burdensome than the public docket currently kept for most of the Department of Transportation rulemakings. However its primary significance is in the context of judicial review, and it will be discussed further in that context.

Proposed §553(f)(2) precludes an agency from "substantially" relying on any material received on the rulemaking that is confidential in nature and not placed in the docket, unless the public has an opportunity to comment on the substance of the material. This provision could unjustifiably result in a cut off in the submission to agencies or the use by agencies of confidential business information in rulemaking proceedings.

"Major" Rule

One of the criteria in the definition of "major rule" in §621 could cause confusion. While Executive Order 12291 states that a major rule is a rule that would result in an annual effect on the economy of $100 million or more, the bill would add that the $100 million or more could be "in reasonably quantifiable direct or indirect enforcement and compliance costs." The bill's addditional language raises the question of whether penalties that might result from enforcement actions must be considered in determining whether a rule is major. As a general matter, it is difficult to determine what an indirect cost is and how to calculate it, or how to tell if something is "reasonably" quantifiable. In our view, indirect costs are far too conjectural to be included in this calculation.

Proposed §622(b) provides that the President's designee (e.g., OMB) may determine that an agency's rules are major, up to a total of 75 per year. This determination may be made up to 30 days after the agency publishes an NPRM (presumably, as a non-major rule). In such a case, the agency would have to stop the rulemaking and produce a preliminary regulatory analysis before proceeding; a delay of many months is certain to result during preparation of the analysis. Under §622(c), the public must then be given an extended period of time to comment on the analysis. A year's delay or more would not be unlikely. It would be much better if the determination of whether rules were major had to be made before the publication of a completed NPRM or even earlier based on the semi-annual agendas and calendars which would be required by the bill.

Regulatory Analysis

General

Proposed §622 would essentially codify existing Executive Order 12291 requirements for regulatory analyses. Proposed §622(c)(2)(E) requires an "explanation" that the benefits of the rule justify the cost of the rule, and that the rule is likely to achieve the objectives of the regulation in a more cost-effective way than the alternatives to it. (It should be noted that this provision, unlike the present Executive Order, does not require that benefits exceed costs.) Even though this provision has an exception for situations where statutes (such as the OSHA statute in the Cotton Dust case) prevent a decision based on cost-effectiveness, this provision is still problematical. Particularly in the context of rules that do not, in an allocative sense, create significant real costs, but rather act to alter distributive patterns, it is difficult (except with respect to transportation costs) to make a meaningful statement about the relative cost-effectiveness of alternatives unless one adopts the point of view of an outside party who will either lose or gain as the result of the regulatory action.

Consultants

Proposed §622(f) prohibits any person other than an officer or employee of the agency from performing the preliminary or final regulatory analysis. This requirement does not preclude the gathering or analysis of information by a source outside of the agency to be used in any such regulatory analysis. If this provision were literally implemented, consultants would be unable to perform regulatory analyses, and, in this time of reductions of agency staff, the preparation of regulatory analyses and, hence, rulemakings, would be substantially slowed. If, as is more likely, the exception would be used to swallow the rule, and agencies would comply by placing a cover memorandum called an analysis upon a thick study produced by a consultant, then it seems doubtful that anything would be gained by the inclusion of this section.

Judicial Review

Proposed §623 of the bill deals with the judicial review of regulatory analyses and determinations of whether a rule is major. Proposed §623(c) would confer authority for judicial review of agency determinations that a rule is not a major rule (but not for a determination by the agency or OMB that the rule is major). This provides yet another method of collateral procedural attack against a rule and an encouragement of dilatory litigation. The timing of the judicial review of "non-major" determinations is unclear. Can such a determination be overturned after a final rule is published? If so, does this action render the rule invalid? It is conceivable that, for example, an agency could designate a rule as non-major at the NPRM stage, and issue a final rule, only to be told the rule is invalid because it erroneously designated the rule as non-major, even though the rule passed muster under the judicial review standards of proposed §706. This form of second-guessing is not a constructive development. To avoid this problem, the language of the bill should be clarified.

Reviews

General

Proposed §631 would require the review over a 10-year period of all of an agency's major rules. We believe a definitional problem exists in this section. In the context of a rulemaking proceeding involving the promulgation of new rules or the revision of existing rules, the rule itself is defined; the rule is either the specific provisions being adopted or those being amended. Whether those rules are, in fact, "major rules" can be determined according to applicable criteria. On the other hand, a requirement that existing "major rules" be reviewed would cause this Department serious problems since, in that context, a "rule" could be defined as any requirement from a regulatory subsection to a chapter in the Code of Federal Regulations. By widening or narrowing the definition, many or few "major rules" would exist. The wider the definition applied, the more regulatory requirements that would be included. This, generally, would lead to a greater cost, which is the primary criterion in determining whether a particular rule is major.

An example of the dilemma we would face under the legislation should clarify this definitional problem. Subchapter G of Chapter I of Title 14 of the Code of Federal Regulations (CFR) is a rule applicable to air carriers, air taxis and commercial operators of aircraft; Part 121 of that Subchapter is a certification and operating rule specifically applicable to air carriers and commercial operators of large aircraft; Subpart L of that Part is a rule setting forth applicable maintenance requirements; §121.369 of that Subpart is a rule covering applicable maintenance manual requirements; paragraph (b) of that section is a rule requiring that certain kinds of materials be included in the maintenance manual; and subparagraphs (1) through (9) of that paragraph are rules requiring specific information to be included in the manual. Part 121 contains 23 Subparts, seven Appendices, four Special Regulations, and over 300 sections with one to 12 paragraphs. Those paragraphs have up to 24 subparagraphs, and those subparagraphs have as many as 12 subdivisions. We doubt that any single section in Part 121 could be considered a "major rule." The Part in its entirety, however, might be a "major rule" as might one or more of its Subparts, Appendices, or Special Regulations. A difficult quandary would be faced by this Department in establishing which existing rules to consider as "major" for review purposes.

There appears to be a small editorial mistake in §631(a)(1)(B)(iii), where the term "proposed rule" probably should be "proposed schedule."

Proposed §631(b)(1)(B) requires a review of a major rule amended after the date of this section. This appears to mean that any amendment to an existing major rule triggers a required review of the entire major rule. For example, if 14 CFR Part 121 is a major rule, and an amendment is made to §121.709(b)(2)(ii), it appears that a review of all of Part 121 would be required. This is a clearly absurd result, and the language of this provision should be revised to avoid it.

Cost Benefits Assessment

Proposed §631(c)(2) requires as part of the review of an existing major rule an assessment of the benefits and the costs of the rule during the period it has been in effect. For many rules, this task will either be impossible or will result only in meaningless generalities. For example, the Federal Highway Administration's rule on hours of service for drivers of commercial vehicles in interstate commerce has existed since the late 1930s. Data from which to estimate its costs and benefits over a greater than 40-year span simply do not exist.

Deadlines

Proposed §633 of the bill provides for the mandatory establishment of deadline dates by agencies for completion of rulemaking proceedings or parts of such proceedings. Information on the expected decision dates for portions of rulemaking proceedings is already provided to the public in Regulatory Agendas, such as those published by the Department of Transportation. This bill already provides for an "approximate" schedule to be published in the Agenda (see §632(a)(3)); this second scheduling requirement does not seem necessary on top of the Agenda schedule. Adding another statutory schedule requirement is duplicative and unnecessary, and publishing an explanation of changes in a predicted schedule is simply an unnecessary expenditure of staff time. It is unlikely to be a spur to fast agency action, particularly in light of the additional burdens placed upon the regulatory process by this bill. Such "deadlines" may leave insufficient latitude for time to respond to public comment. It also may imply to the public that, since the agency has established a date for a final rule before it even knows the nature or extent of public comment, the agency has already made up its mind -- that it will do what it proposed regardless of public comment.

Annual Report to Congress

Proposed §641 of the bill requires an annual report from the President to the Congress on the Government's regulatory activities. The requirement of one more report from the Executive Branch to the Congress -- which, if it is like most statutorily required reports, will take a significant amount of agency staff time to produce with sometime questionable benefit -- seems unnecessary and wasteful. An annual, overall, conglomerate report of this kind is likely to be far less useful to the Congress in its serious job of agency oversight than the normal committee oversight process. Moreover, since the agency semiannual agendas would contain information on regulations that have been issued as well as those proposed, they should suffice.

Judicial Review

Presumptions Re: Agency Action

Proposed §706 would amend the judicial review portion of the Administrative Procedure Act by including a variation of the so called "Bumpers Amendment," which prohibits any presumption in favor of or against an agency on matters of law involved in a court challenge to a rule. The presumption of validity is a fundamental part of the rulemaking process. Underlying the presumption is the correct view that agency officials have expertise in factual and legal matters surrounding the rules under their jurisdiction, and that it is inappropriate and wasteful of resources for courts to be invited to substitute their own judgment on these matters of fact and law. (Not just staff, but -- at least in some instances -- the agency head must have experience in the agency's area of expertise. See, e.g., 49 U.S.C. §1341(b). Such experience is not required of judges.) There is little merit in changing a well-founded and workable standard of review in order to make the defense of agency action more difficult and the tasks of any opponent of a rule easier.

"Short of Statutory Right"

Proposed §706(a)(2)(C) adds to the grounds for judicial invalidation of a rule that the rule is "short of statutory right." The meaning of this new term is quite vague. Unless it is substantially clarified, it is a likely source of a long process of exegesis by the courts and law reviews. Meanwhile, agencies and the public will be confused, rulemaking actions delayed, and attorneys' fees increased.

"Substantial Support"

The other very troublesome portion of the judicial review provision is subparagraph (a)(2)(F), which instructs courts to hold unlawful agency actions "without substantial support in the rulemaking file, viewed as a whole, for the asserted or necessary factual basis, as distinguished from the policy or legal basis, of a rule adopted in a proceeding subject to Section 553..."

The basic problem with this provision is that, in effect, it applies to informal §553 rulemaking, in the context of a judicial review statute, the substantial evidence test which heretofore has been applied only to formal rulemaking and to quasi-judicial proceedings. While the words "substantial support" and "substantial evidence" are different, it is difficult to discern any substantive difference between the two that the courts could rely upon. The result of the requirement for substantial support for factual claims in a rulemaking file would be to overformalize the informal rulemaking process. It could cause agencies to become excessively cautious and to develop excessively detailed records for their proceedings. This would not only delay rulemakings, but would also reduce the ease with which an agency could rely on its general expertise. It is crucial to the reasonable exercise of rulemaking authority that the agency not have to document every jot and tittle of the expertise on which it bases its conclusions. If every factual matter relied upon had to be documented in the file, agencies would have to collect testimony or affidavits, at a very great cost in time, resources, and effort, from perhaps hundreds of its personnel in order to justify a relatively simple point in a regulation. Such a procedure would be highly contrary to effective and efficient use of agency resources in rulemaking.

As a matter of policy, the Department does not object to the principle that rulemaking actions should be solidly supported in factual matters. Indeed, Executive Order 12291 requires such "substantial support" for rules. However, the proposed bill applies the requirement in the context of judicial review unlike the Executive Order (which explicitly disclaims forming the basis for court challenges to the content of rules and which does not preclude a determination of "substantial support" based in part on the agency's overall expertise). The bill's requirement of "substantial support" located in a "file" -- a specific set of documents -- is far more likely to create a new source of obstructive litigation.

"Ascertainable Legislative Intent"

In proposed §706(c) courts are instructed to require that acts by the agency be within the scope of agency jurisdiction or authority on the basis of statutory language or, in the event of ambiguity, "other evidence of ascertainable legislative intent." This reference is ambiguous and potentially troublesome. It appears to require an agency affirmatively to demonstrate "ascertainable legislative intent" in order to sustain its assertion of jurisdiction. It is difficult to know what would constitute a showing of ascertainable legislative intent sufficient to sustain agency action, particularly given the ambiguity of the legislative history of many statutes. Nor is it clear that an agency should be required in all cases to show such a presumably explicit basis for its assertion of authority. In some cases, it should be possible to show what Congress intended by what Congress did not do, especially if, in context, a failure or refusal by Congress to act can be reasonably construed as deferral to a well-established agency policy.

In a sense, this provision indirectly reintroduces into judicial review of rulemaking the long-discredited requirement, used by the Federal courts to strike down Federal Government action in the first third of the 20th century, that legislation explicitly and specifically delegate to the Executive Branch the authority for every regulatory initiative. Unless Congress is prepared to legislate detailed program requirements, safety and health standards, and so forth, this is a legal step backward that Congress should be most reluctant to take.

Venue

The venue provisions of the bill (amending 28 U.S.C. §2112) attempt to ameliorate the "race to the courthouse" problem in judicial review of rulemakings. The Department agrees with the intent of this provision, but suggests that the provision itself is very complex and unwieldly and should be further refined and simplified before legislation is enacted.

General

The substantial delays, complications, and opportunities for additional litigation that this bill would create will make it much harder fur agencies to carry out the tasks that Congress assigns them. Congress should be aware, in particular, that these delays and obstacles will impede the regulatory reform efforts that the Administration is making to reduce the burdens of existing rules. Consequently, many provisions of the bill would delay or defeat the purposes that Congress seeks to achieve through legislation of this kind.

THE GENERAL COUNSEL OF THE TREASURY
WASHINGTON, D.C. 20220

FEB 5 1982

Dear Mr. Chairman:

The following expresses the views of the Department of the Treasury on the substitute version of S. 1080, the "Regulatory Reform Act", as reported November 30, 1981 in the Congressional Record.

The bill, in each of its several versions, contains a series of amendments to the rulemaking and judicial review provisions of the Administrative Procedure Act. In many respects, the bill would merely codify procedures similar to those presently in effect under Executive Order 12291 (February 17, 1981), such as designations of major rules and requirements for regulatory analysis of such rules. However, there are also a number of provisions which raise serious concerns about the proper role of the judiciary in the rulemaking process.

The impetus for regulatory reform activity has been a desire to insure greater accountability in agency rulemaking and to limit the exercise of unbridled discretion by agency officials. We support those objectives and the general intent of this legislation. But, whether these objectives can be met by creating an expanded role for the judiciary in the rulemaking process is open to serious question. Of the three branches of government, the judicial branch is perhaps least accountable for its actions. Permitting the judiciary to become substantially involved in the rulemaking process could well produce unintended results and lead to a situation in which the judiciary routinely substitutes its political and value judgments for those of the elected President. We feel confident that substitute controls emphasizing the role of the Chief Executive rather than the judiciary are available to serve the important goals of S. 1080.

At the time the present version of S. 1080 was introduced, three major areas were identified as included in the bill, but not resolved between the Judiciary and Governmental Affairs Committees, which have each reported separate versions of S. 1080. These unresolved matters include: (1) the so-called Bumpers Amendment, which would add a new "substantial support" test for factual determinations made by an agency during rulemaking proceedings and would prohibit courts from according a presumption of validity to agency interpretations of law; (2) the form of judicial review to be permitted of an agency determination concerning whether a rule has an economic impact of $100 million or more and is therefore a major rule; and (3) the scope of Presidential authority to establish procedures to insure agency compliance with regulatory analysis requirements.

Among these three areas, the Treasury Department is primarily concerned with the Bumpers Amendment and accompanying proposals. Section 5 of S. 1080 contains three proposed amendments to 5 U.S.C. Sec. 706. First, it would add the word "independently" to the first sentence, thus providing that the reviewing court shall "independently" decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of an agency action. Second, it would add clause (F) to subsection 2, permitting the reviewing court to set aside agency action "without substantial support in the rulemaking file, viewed as a whole, for the asserted or necessary factual basis, as distinguished from the policy or legal basis, of a rule adopted in a proceeding subject to section 553 of this title . . .". Third, there would be a new subsection (c), providing that, "In making determinations concerning statutory jurisdiction or authority under subsection (a)(2)(C) of this section, the court shall require that action by the agency is within the scope of agency jurisdiction or authority on the basis of the language of the statute or, in the event of ambiguity, other evidence of ascertainable legislative intent. In making determinations on other questions of law, the court shall not accord any presumption in favor of or against agency action."

Each of these three provisions is ambiguous, and thus capable of producing unintended results. In this regard, we note the comments of the Administrative Conference of the United States, published in the Federal Register on December 29, 1981 (46 F.R. 62805). The Administrative Conference opposes any across-the-board legislation which would alter the weight reviewing courts afford agency statutory interpretations or expertise. Specifically, the Administrative Conference finds the present proposals susceptible to varying interpretations and unlikely to cure the underlying problem. The Administrative Conference has also suggested alternate language for amending section 706 which warrants further consideration.

The Treasury Department has consistently opposed legislation, such as that proposed in new subsection (c), which would change the present judicial practice of according due deference to agency expertise and interpretations of law in this area. Any such change would surely create new opportunities for judicial intervention in matters properly delegated to the Executive Branch, perhaps to a far greater degree than intended or anticipated.

The Department is particularly concerned about the potential effect of applying the Bumpers Amendment to tax regulations. If the presumption of validity for tax regulations were weakened or eliminated, their authority would be attenuated and their value in providing guidance to taxpayers would be correspondingly reduced. Moreover, aggressive taxpayers would be encouraged to take positions contrary to the regulations, thus making tax administration more difficult.

To the extent that there are perceived deficiencies in present rulemaking procedures, there are alternatives far less likely to produce undesireable results. As stated by the Administrative Conference in its recent comments: "Sounder policy judgments in the organic laws and other statutory grants of administrative power, more precise delegation, and systematic oversight and reevaluation of agency missions are far better ways than changing the standards of judicial review."

Similarly, the Treasury Department opposes the proposed section 706 (a)(2)(F) which would permit overturning agency action found to be without substantial support in the rulemaking file for the factual basis of a rule adopted pursuant to 5 U.S.C. Sec. 553. (Under proposed new section 553(f)(1), the agency would be required to maintain a rulemaking file which would constitute the rulemaking record for purposes of judicial review). Traditionally, informal rulemaking under the Administrative Procedure Act has not been a fact-finding process. It does not appear that it is intended to become exclusively a fact-finding process under the proposed amendments to 5 U.S.C. Sec. 553. Under section 553, views, rather than tenders of evidence, have been provided to the agency during rulemaking procedures, and the judiciary has been required to accept the findings of executive branch officials on the issue of the basis for the rule, subject only to a finding -- after an evidentiary trial -- that the agency acted in an arbitrary or capricious fashion.

To permit the judiciary to consider a record -- which suggests the presence of factual evidence rather than views and comments -- would overturn this long-established approach to rulemaking and invites the judiciary to substitute its judgment for that of the executive.

However, in the event that Congress determines that judicial review of a record is necessary, the rulemaking file that is maintained by an agency should be understood to be a non-exclusive collection of views and opinions rather than an exclusive factual record. Similarly, to the extent that Congress determines that the courts should be permitted to make a "substantial support" finding, it should not be a separate basis for setting aside agency action, but rather one factor that the court may consider in determining whether the action was arbitrary, capricious, or an abuse of discretion.

Section 3 of the new version of S. 1080, which would amend 5 U.S.C. Sec. 553, contains another provision which causes great concern. In providing the opportunity for participation in rulemaking proceedings for a major rule, the new proposal would require ". . . an opportunity for direct and cross-examination of the principal agency employees or other persons who prepared for the agency data on which the agency substantially relied in formulating the rule . . .". Although this procedure would be required only where other procedures were determined to be inadequate, agency determinations on this issue would be subject to judicial review, and could be held unlawful where ". . . the court finds that such failure [to provide the procedure] substantially precluded a fair consideration and informed resolution of a central issue of the rulemaking taken as a whole." While it is true that the agency is not required to permit direct and cross-examination of agency officials and that judicial review of the agency determination in that regard appears to be somewhat limited, the Department is, nonetheless, concerned that it may also produce unintended results without any corresponding benefits.

The explanation of S. 1080, which appeared in the Congressional Record on December 11, 1981, indicates that this provision is directed toward ". . . middle level officials who have direct managerial responsibility for the development of factual and methodological material." It is not clear what this would add to the rulemaking process. As noted above, informal rulemaking has never been a fact-finding process, and therefore it is not susceptible to this type of treatment. What can reasonably be anticipated from enactment of this provision is a reluctance on the part of mid-level managers to act at all in agency rulemaking. Rulemaking is already an expensive and time-consuming process, and even the potential availability of such additional procedures can be expected to lead to substantial increases in time and expense.

In addition, there is no apparent need for the judicial review provision that has been included with this section. To the extent that Congress feels that there should be judicial oversight of procedures made available in agency rulemaking, it would appear that 5 U.S.C. Sec. 706 provides an adequate basis for judicial review, without the need for a new provision which could be subject to unintended interpretations. However, if a distinct provision is determined to be necessary, that contained in the Governmental Affairs Committee version of S. 1080 would be preferable. That provision permits setting aside an agency rule only where ". . . the court finds that such failure [to provide a procedure] was so serious and of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if the procedure omitted by the agency . . . had been used." This standard would be far less disruptive to the rulemaking process.

With regard to other amendments to 5 U.S.C. Sec. 553 contained in the bill, the Department observes that, by reason of the limitation to the definition of the term "major rule" set forth in clause (I), pertaining to section 621(4)(A), regulations involving the internal revenue laws would not be subject to the expanded cost-benefit analysis requirements and periodic review requirements contained in the bill merely by virtue of having an annual effect on the economy of $100 million or more. This exemption is necessary and Treasury strongly urges that it be retained. The Department also believes that the exemption should apply as well to Customs duties, which are a form of taxes.

Further, the Department is very concerned about the potential effect on IRS revenue rulings and revenue procedures which may be caused by narrowing the exemption for interpretative rules. Under section 553(a)(3), as contained in the bill, an interpretative rule would not be exempt from section 553 if it "has general applicability and substantially alters or creates rights or obligations of persons outside the agency." It is possible that, as a result of this change, IRS revenue rulings and revenue procedures could be subjected to the notice and comment provisions of section 553. Revenue rulings are different from tax regulations. They do not have a presumption of validity but merely set forth the IRS' position on the application of the tax law to a narrow fact situation. (Revenue procedures are similar except that they deal with procedural matters.) It would severely undercut their value as a source of prompt guidance to taxpayers and revenue agents if revenue rulings and revenue procedures were subject to notice and comment. We are generally pleased that the Senate Committees on the Judiciary and Governmental Affairs both have indicated that revenue rulings are not intended to be subject to notice and comment, although we are somewhat concerned about some ambiguity on this point in the Judiciary report. See S. Rep. 97-305, 97th Cong., 1st Sess., p. 20, and S. Rep. 97-284, 97th Cong., 1st sess., p. 112. Further clarification would be helpful on this point.

Also, the substitution of section 553(a)(4) for the present exclusion from rulemaking procedures under section 553(a)(3) of matters relating to contracts is inadequate to maintain the present exception for Treasury agreements with financial organizations for depositary services. Those agreements are set forth in published regulations for convenience of administration. See, 31 C.F.R. Parts 202, 203, and 214. Such contracts are not subject to criteria or procedures established by the Administrator of GSA or OFPP. Therefore, the Department urges that the scope of the exception relating to contracts remain unchanged and that the words "or to contracts" be added to the end of section 553(a)(2).

Section 632(a)(3) would require inclusion in the agency semiannual agenda of an approximate schedule for completion of significant actions with respect to each project. It would be difficult for the IRS to set or meet a schedule of this type because priorities for the issuance of tax regulations often shift swiftly and unpredictably. For example, following enactment of a major tax bill, the regulation priorities are often rearranged to permit prompt issuance of certain regulations under the provisions of the new law.

An additional new feature of this bill which could prove troublesome would require the agencies to establish deadlines for final agency action on notices of proposed rulemaking. Agency failure to meet the established deadlines would then be a factor which the courts could consider in determining whether agency action has been unlawfully withheld or unreasonably delayed under

5 U.S.C. 706(a)(1). The problem created by this provision for tax regulations is similar to that created by the deadlines provision -- constantly changing priorities make it difficult to know when action on tax regulations can be completed. Also, the schedule for publishing a final rule depends a great deal on the amount of public comment -- which is not known at the time the notice of proposed rulemaking is published.

The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the submission of this report to your Committee.

Sincerely yours,

Peter J. Wallison
General Counsel

The Honorable
William V. Roth
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

FEB [illegible] 1982

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D. C. 20510

Dear Chairman Roth:

This letter represents the Equal Employment Opportunity Commission's views concerning Senator Laxalt's Amendment to S. 1080 introduced on November 30, 1981, Amendment No. 640.

This agency's main objection to Senator Laxalt's amended bill is its judicial review provisions (Section 5) which would eliminate any presumption of validity for agency regulations, require courts to independently decide all questions of statutory construction, and apply a "substantial support" test to "factual" questions involved in informal rulemaking.

The noted amendments to the Administrative Procedure Act (APA) regarding the presumption of validity for agency regulations and the requirement for courts to independently decide all questions of statutory construction [Section 706(c)] will encourage costly and time consuming litigation, create considerable uncertainty about the regulatory standards with which private individuals and companies must comply, and seriously undermine the ability of agencies to carry out their Congressional mandates. Such changes in the APA are unnecessary since current legal standards require careful judicial scrutiny of administrative actions. See e.g., Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415-16 (1971).

The Commission particularly objects to the changes set out in amendment 5 U.S.C. §706, Subsection (c) which would require a court to determine that the authority for agency action has been granted expressly by statute or is clearly contained in legislative intent. This provision fails to take account of the broad grants of authority contained in many statutes[1] and the sketchy legislative histories which frequently accompany legislation.[2] It is often the case that there is simply no clear expression of Congressional intent on the myriad problems which arise in the administration of a statute. The proposed changes will not allow an agency to address these problems and, therefore, it will not be able to carry out its overall mission as defined by statute.

In Section 706(a)(e) the court is given the authority to set aside agency action not found to be substantially supported by the rulemaking file. Even though the amended bill increases public comment procedures and analytical requirements, and requires the creation and maintenance of a rulemaking file, it is possible that a sufficiently comprehensive record on all factual issues or matters may not emerge. Moreover, the amended bill states that the "substantial support" requirement only applies to the factual basis of the rule as opposed to the legal or policy basis. In practice, however, it may be very difficult to segregate the "factual" basis of the rule from the discretionary policy decisions made by the agency.

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[1] The proposed language raises the possibility that courts could be unable to use the flexible tools of statutory construction in reviewing agency action that have evolved as the necessary concomitants of broad delegations to agencies. For instance, if a statute does not explicitly anticipate a particular problem that arises in its implementation, and the legislative history is silent on the point in issue -- as happens not infrequently -- a court would likely inquire whether the agency action is consistent with and "reasonably related to the purposes of the enabling legislation...." Thorpe v. Housing Authority of the City of Durham, 393, U.S. 268, 280-81 (1969); See Mourning v. Family Publications Services, Inc., 411 U.S. 356 (1973).

[2] We note in this connection that the final version of the Civil Rights Act of 1964, which is administered by the Commission, arose as a floor amendment in the Senate, and there is no Committee report explaining major substantive provisions of the statute. See United States v. Georgia Power Co., 474 F.2d 906, 920 (5th Cir. 1973).

Regarding rulemaking procedures, please note that Senator Laxalt's amended S. 1080 creates rigorous economic and regulatory analysis requirements and public comment procedures. Similar, though less exacting and extensive, measures are presently required by the present APA, Executive Order 12291 and the Regulatory Flexibility Act (Pub. L. 96-354). It seems quite questionable whether additional quantification of rulemaking, analyses, and public comment procedures will necessarily produce less complicated and less burdensome regulations than the requirements presently in effect. Clearly, these additional requirements shall increase the time, costs, and resources (both private and public) necessary for rulemaking at a time when the government is trying to decrease agencies' budgets and personnel.

Set out below are some items which we believe require further elaboration.

1. As you may be aware, pursuant to Reorganization Plan No. 1 of 1978 and Executive Order 12067 this agency carries out the function of streamlining and making more uniform and less burdensome EEO requirements across the government. Inasmuch as Senator Laxalt's proposal does not speak to the issue of interagency coordination to reduce regulatory burdens, it is unclear whether his proposed legislation may have the undesirable result of eliminating EEOC's coordination function which has been effective in diminishing conflicting and burdensome EEO requirements. There are, also, other coordinating requirements regarding other matters for Federal agencies either mandated by statute or Executive Order. Similarly, it is unclear whether or not these requirements will be adversely affected by this legislation since it may supersede prior requirements.

2. Under Section 623 an agency's determination that a rule is or is not a major rule within the meaning of Section 621(4)(A) is subject to judicial review. The term "agency" is defined to include both executive and independent agencies. Determinations as to major rules by the President or his agent are not open to judicial review. Because Section 624 provides for Executive oversight and Executive Order 12291 requires OMB approval of and participation in executive agencies' rulemaking, an executive agency should be able to rely on such Executive participation and approval to deny judicial review under Section 623.

3. Proposed Section 553(a)(3) excludes from coverage "an interpretive rule, general statement of policy, or rule of agency organization, procedure or practices, unless such rule or statement has general application and substantially alters or creates rights or obligations of persons outside the agency."

It is unclear to us exactly what interpretive rules, if any, issued by an agency (like EEOC) which must ultimately rely on court interpretation and court enforcement of its statute, shall substantially alter or create rights or obligations.

4. Other terminology in the proposal is unclear and further clarification and elaboration on meaning may be necessary to guide agency action. Otherwise, it appears that such terminology may be left to definition by the courts. Some examples are the following:

   Section 553(5)(B) and (c) - terms like "reasonable alternatives" and "factual conclusions";

   Section 621(4)(A)..."an annual effect on the economy";

   Section 621(5) and 6 - the terms "costs" and "benefits" as to whether or not they are meant to include monetary and non-monetary and quantifiable and non-quantifiable matters; and

   Section 622(e) - which is equivocal about a requirement of quantification and, where quantification is required, the ranges of prediction and margins of errors appear beyond economic analysis.

5. It is unclear from Section 553(f) whether an agency has the responsibility of supplying copies of items in the rulemaking file or just making such items available for the public to read. If the agency must provide copies, who is to bear this cost as well as associated administrative costs in making such information available? Under the Freedom of Information Act (FOIA) such costs are born by the requester, and it would appear appropriate that similar procedures should apply to requests for information in the rulemaking file.

The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the submission of this report to your Committee.

I trust our observations are helpful.

Sincerely,

Edgar Morgan

Edgar Morgan
Director
Office of Congressional Affairs

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

February 19, 1982

IN REPLY REFER TO:
3010

Honorable John Glenn
Ranking Minority Member, Senate
  Subcommittee on Energy, Nuclear
  Proliferation and Government Processes
576 Carroll Arms
Washington, D.C. 20510

Dear Senator Glenn:

This is in response to your recent request for further views of the Federal Communications Commission on the executive branch oversight provisions of the consensus substitute amendment for S. 1080, the "Regulatory Reform Act", Amendment No. 640. I understand that this legislation, which seeks to reform agency informal rulemaking procedures and to modify existing executive branch and judicial review of agency regulation, is expected to be debated by the full Senate beginning later this month.

To date, our Office of General Counsel has commented five separate times on this legislation. On four of these occasions, we have raised concerns with regard to the provisions of S. 1080 authorizing executive branch oversight of independent agency compliance with the new regulatory analysis and rule review requirements of S. 1080. (*See* Attachments 1-4).

You now request, in addition to any further views we may have concerning the executive oversight provisions of S. 1080, any examples of "major rulemaking activity by [our] agency where independence of agency decision-making might be adversely affected by Presidential action pursuant to the authority conferred by S. 1080." Finally, you request our views regarding the effect of the "savings clause" language of section 8 of S. 1080 on the exercise of this new executive branch oversight authority mandated by the legislation.

Description of Executive Oversight Provisions

The executive oversight provisions of S. 1080, as reported by the Senate Judiciary Committee and embodied now in Amendment No. 640, would for the first time grant statutory authority to the President, or his designee within the executive branch, to

1) designate proposed agency regulations as "major rules", triggering the "regulatory analysis" or cost-benefit analysis requirements of S. 1080 (see §622);

2) "establish procedures for agency compliance" with the regulatory analysis and rule review provisions of the legislation (see §624);

3) designate existing major agency rules for periodic review (see §631(a)(2)); and

4) compel amendment of any proposed agency schedule for periodic review of existing rules (see §631(f)(2)).

Significantly, this new executive branch statutory authority would extend for the first time to the rulemaking process of traditionally independent regulatory agencies such as the Federal Communications Commission. The mandatory nature of this new compliance authority is underscored by the fact that under the language of the proposed new §624 of Title 5 of the United States Code, the President would have "the authority to monitor, review, and _ensure_ agency implementation" of rulemaking procedures in compliance with the legislation. (emphasis added). Moreover, §624 provides that the exercise by the President or his designee of this new statutory executive branch oversight authority "shall not be subject to judicial review in any manner under this Act."

General FCC Concerns

Such extensive, possibly unreviewable, authority could constitute a "serious intrusion" on the independence of the decisionmaking process of this and other independent regulatory agencies. The seriousness of this intrusion stems from the fact that the new executive branch oversight authority in S. 1080 would permit extension to the independent agencies of the oversight provisions now applicable to executive branch agencies under the Executive Order on Regulatory Relief (E.O. 12291). That executive order mandates, among other provisions, the submission of _all_ proposed agency rules to the Office of Management and Budget (OMB) for review and clearance prior to their promulgation or even publication for public comment. Under E.O. 12291, OMB since February 1981 has rejected at least 52 proposed agency rules, effectively exercising a form of veto power over the issuance of executive agency regulations.[1] S. 1080 would codify the extensive procedural authority of E.O. 12291 and apply its provisions for cost-benefit analysis of proposed "major rules", preparation of regulatory agendas, and periodic review of existing regulations to all agencies, including the FCC and other independent regulatory agencies.2/

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[1] _See_ Michael Wines, "More Power, Yet More Criticism for OMB", _National Journal_, Jan. 16, 1982, p. 93 ("...of the 52 proposed rules that flunked an OMB review, only 17 were changed and resubmitted to OMB for approval. As for the others, 'by and large, they died,' an OMB official said."); Felicity Barringer, "OMB Accused of 'Backdoor' Policy Role", _Washington Post_, July 24, 1981, p. A17 ("At times OMB seems to have pressured agencies into policy changes...in some of the cases...OMB officials clearly pressured an agency to change a regulation about to become final.")

? 2/ The specific procedural provisions of E.O. 12291, which could be applied to the FCC and other independent agencies under the proposed codification in S. 1080, would authorize the President or OMB to:

1. establish the criteria for agency determination of a "major rule" and the conduct of regulatory analysis;
2. order an agency to treat a rule or set of related rules as "major";
3. require the submission of every proposed major rule and preliminary regulatory analysis to OMB 60 days before publication in the Federal Register;
4. require the submission of all other proposed rules to OMB 10 days before publication;
5. order an agency to delay publication of a notice of proposed rulemaking and preliminary regulatory analysis until OMB has completed its review;
6. require an agency to obtain and evaluate additional data on any proposed rule "from any appropriate source";
7. require an agency to send OMB its final major rule and final regulatory analysis 30 days before publication;
8. require an agency to send all other final rules to OMB 10 days before publication;
9. require an agency to provide particular information in its regulatory analysis, including a determination of the "potential net benefits" of the proposed rule;
10. order an agency to delay publication of a final rule or final regulatory analysis until the agency has received OMB's views, responded to them, and placed the views and response in the rulemaking file;
11. require an agency to provide particular information in a semi-annual regulatory agenda;
12. require inter-agency consultation on overlapping or duplicative rules;
13. designate existing agency rules as "major" and require regulatory analysis; and
14. establish agency schedules for conducting regulatory analyses and reviews of both proposed and existing rules.

A significant issue in any OMB preclearance review process would be the adequacy of an agency's regulatory or cost-benefit analysis, a matter inextricably tied to the substance of the agency proceeding. Thus, this nominally procedural OMB review could clearly be used to direct substantive agency decisionmaking. The mandate in S. 1080, §624, that the President or OMB "ensure" agency compliance with the legislation, therefore, not only constitutes a new authority for the executive branch over the procedural decisions of independent agencies like the FCC but also enables such procedural authority to be used to accomplish substantive control of independent agency decisionmaking. This concern is heightened by the fact that the extent of this new executive branch authority is neither adequately defined nor limited by the bill, despite the "savings clause" language in section 8 (see p. 16, *infra*.).

The use of this extensive new procedural authority to affect substantive agency policy raises problems with particular regard to the FCC, an agency which Congress created as an independent body to oversee mass communications media and telecommunications policy under direct congressional, not executive branch, control. Legislative concern over executive branch dominance in sensitive areas such as radio and television licensing, political broadcasting, and telecommunications led Congress to determine that policy in these areas should be formulated by an independent, collegial body with only limited ties to the political authority of the President. Moreover, due primarily to First Amendment concerns, we believe it is particularly important today that the FCC, which occupies a critical governmental position regarding the communications media, should be able to maintain a unique independence from the executive branch. Such independence, however, in our view, could be seriously undermined by the executive oversight provisions of S. 1080 and Amendment 640 with their potential for the executive branch to control the independent rulemaking authority of the FCC and thereby to influence unduly substantive communications policy.

FCC Recommendations

Based on these general concerns, we have previously recommended to the appropriate House and Senate committees that they amend the executive oversight provisions of S. 1080 first, to exempt from such oversight the independent regulatory agencies which are defined and listed in the Paperwork Reduction Act of 1980, P.L. No. 96-511, §§3502(1)(10), and second, to allow the independent agencies to revise their schedules for the review of existing rules without first securing the concurrence of OMB. Further, we do not believe the President or OMB should be authorized to designate existing agency rules for review and thereby effectively set agency priorities.

In lieu of such excessively intrusive executive branch oversight, we agree with the House Judiciary Committee that Congress, utilizing its existing oversight procedures, can adequately ensure independent agency compliance with the requirements of S. 1080.

We have further pointed out that while we would urge a total exemption from the executive oversight provisions for independent regulatory agencies, as voted by the House Judiciary Committee during its markup of H.R. 746 (the comparable House version of S. 1080), we could support the version of §624 which you first proposed and the Senate Committee on Governmental Affairs adopted, rather than the far more intrusive, mandatory compliance language proposed by the Senate Committee on the Judiciary. Under your version of executive oversight, any Presidential directive to independent agencies concerning their rulemaking procedures implementing S. 1080 and the procedures themselves, relating to proposed or final rules and associated regulatory analyses, would only constitute a "nonbinding, advisory recommendation."

We again urge the adoption of our recommendations or your version of executive oversight. Our recommendations are based on both our general concerns summarized above and on the following specific examples we discuss below of "major rulemaking activity" by the FCC "where independence of agency decision-making might be adversely affected by Presidential action pursuant to the authority conferred by S. 1080."

Examples of FCC Rulemaking Activity and the Impact of S. 1080

Our concerns that this new executive branch procedural authority could be abused to interfere with the politically independent rulemaking process of the FCC and to affect substantive communications policy may be illustrated by the following examples.

1. FCC Authorization of Cellular Radio Service

In May 1981, the Commission issued a *Report and Order* authorizing the introduction of commercial "cellular" mobile radio telephone service. *See Report and Order* in CC Docket 79-318, Cellular Communications Systems, 86 FCC 2d 469, 46 Fed. Reg. 27655(1981). The efficient spectrum use offered by cellular systems will allow a significant expansion in mobile communications, particularly of radio telephone service. Balancing its goal of encouraging telecommunications competition against the need to make the new cellular service widely available as soon as possible, the Commission had to choose among a variety of potential options concerning the amount of necessary spectrum space, the nature of the frequency allocation and the comparative roles of wireline carriers (such as local telephone companies), and radio common carriers, in offering the new service. To assure the most rapid introduction to the public of needed improvements in radio telephone service promised by the new cellular technology, the Commission ultimately decided upon a five-year, dual franchise allocation scheme. This division of available frequencies allocates half the available spectrum in each market to the wireline carriers serving that market -- because of advanced wireline carrier expertise in the new cellular technology -- and the other half to non-wireline, radio common carriers.

In December 1981, the Commission affirmed the basic policy decision of its May 1981 cellular action after weighing the benefits of further efforts to fine tune the Commission's *Report and Order* against the loss of service the public would suffer from further procedural delay. *See Petitions for Reconsideration* in CC Docket 79-318, Cellular Communications Systems, ___ FCC 2d ___ (1981).

Impact of S. 1080. If S. 1080, including its executive oversight provisions, had been in effect, it is unlikely the Commission would have been able to act as expeditiously as it has in authorizing the introduction of the new cellular radio technology. Because of the cellular proposal's likely economic impact in excess of $100,000,000, the Commission would have been obligated under S. 1080 to treat the proposal as a "major" rulemaking, thus triggering the regulatory analysis and executive branch review and clearance procedures cited above. Such executive oversight authority might well have delayed or even prevented the introduction of this needed cellular service. The FCC, meanwhile, would have had to expend limited Commission resources responding to the executive branch. It is quite possible, moreover, that the executive branch might not have agreed with the conduct or content of the Commission's cost-benefit analysis. Or it could have questioned the FCC's dual allocation scheme and thus have sought to force a major substantive change in the Commission's resolution of this communications policy issue by means of the procedural authority in S. 1080.

Furthermore, regulatory analysis as enforced by the executive branch under S. 1080 would require the Commission to assess the costs and benefits of each reasonable alternative. However, such an exercise would have been both expensive and unreliable in the cellular radio proceeding because the precise nature of the demand for the various potential services cannot be determined at this time. Moreover, it is extremely difficult, if not impossible, to measure the benefits of new technology, many of which are likely to be unanticipated. Yet, to have delayed a decision until more complete data was available would only have encouraged the domestic introduction of foreign manufactured cellular radio equipment, already in place and operative, for example, in Japan.

In our judgment, some regulatory decisions such as the cellular radio proceeding, in order to avoid the adverse consequences of delayed public service, lost technological expertise, and excessive agency costs, must be made without obtaining complete information on all of the potential effects of the decision. To delay regulatory action, however, until enough information is available so as to meet the analysis requirements of S. 1080 as enforced by the executive branch would likely ensure these adverse consequences, particularly in the rapidly evolving environment of the telecommunications marketplace.

2. FCC Regulatory Review Working Group Project

We note similar concerns about increased procedural delay, escalated agency costs, and interference with the independence of the FCC's rulemaking process when we consider the potential impact of the executive oversight provisions of S. 1080 on a major FCC deregulatory initiative: our "Regulatory Review Working Group."

As Chairman Fowler announced during oversight hearings last summer, the task of this internal review group is to assist the Commission's Bureaus and Offices in a comprehensive, systematic examination of each of the Commission's rules and policies. Consistent with one of the five major management objectives Chairman Fowler has announced for the FCC, the goal of this regulatory review is the elimination of all unnecessary FCC rules, regulations and policies.

The Regulatory Review Working Group initially is performing a "zero-based" legal and economic analysis of all FCC rules, as given priority by the Commission Bureaus and Offices. The group is evaluating these rules, for example, in terms of their statutory authority, consistency with original intent, cost-benefit ratio, and economic impact. This evaluation will serve as the basis for the Bureaus and Offices to prepare recommendations for full Commission action.[3]

Impact of S. 1080. The executive oversight provisions of S. 1080, especially in the context of regulatory review, could clearly threaten and interfere with the independence of the independent agencies to establish and execute their own rulemaking priorities. As noted, §§631(a)(2) and (f)(2) of S. 1080 would authorize the President or OMB to choose additional existing major rules for agency review as well as to control any revisions of an agency's review schedule. Under these provisions of S. 1080, an agency would have less independence to conduct its own regulatory review project such as the one now underway at the Commission, setting its own internal review priorities and conducting the review according to its own time schedule, without the exercise of a possible OMB veto or override.

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[3] Aside from the important work of the Regulatory Review Working Group, the Commission in the past eight months has already taken a number of important deregulatory initiatives, including the proposed deregulation of noncommercial radio broadcasting, the elimination of the First Class Radiotelephone Operator licensing requirement, and a substantial reduction of the burden involved in applying for construction permits for broadcast stations. Still under consideration and likely to be acted upon in 1982 are proposals to deregulate the subscription television industry. The Commission may also consider proposals to deregulate commercial television stations in ways similar to those the Commission has already implemented to deregulate commercial radio stations.

Moreover, OMB rule review would not only affect agency independence but would also be both duplicative and unnecessary, particularly with regard to the rulemaking process of the FCC. Thus, while the Commission might look to OMB for ideas and suggestions on how better to review agency rules and regulations, the Commission will continue to rely primarily on its own Regulatory Review Working Group as well as the Office of Plans and Policy to review and recommend revisions of FCC rules and regulations. The Commission, in our judgment, must conduct such rule review and all its rulemaking proceedings independent of the executive branch.

Our concern over the executive oversight provisions of S. 1080 in the context of regulatory review are exacerbated by the omission from S. 1080 of any deregulatory exemption from the regulatory analysis requirements of the legislation. The House Judiciary Committee added such an exemption to H.R. 746, the House counterpart bill to S. 1080. This language in §621(2)(c) of H.R. 746 would exempt from the definition of "major" rules "a rule [other than a major rule having a substantial impact on health, safety, or the environment] that repeals, withdraws, or otherwise modifies a rule or group of related rules promulgated before the effective date of this subchapter so as to eliminate or reduce the compliance burdens of that rule or group of rules."

Such a deregulatory exemption would enable the Commission to dispense with cumbersome regulatory analysis provisions when it attempts to deregulate and to cut back on unnecessary or outdated regulation. Without such an exemption, the executive oversight authority of S. 1080 might well delay or forestall agency deregulatory activities, particularly since it is quite possible under these provisions that the President or OMB would be able to require the agencies to conduct a regulatory, cost-benefit analysis of all "major" *deregulatory* proposals, as well as regulatory ones. *See*, *e.g.*, E.O. 12291, §3(i), "Agencies shall initiate reviews of currently effective rules in accordance with the purposes of this Order, and *perform Regulatory Impact Analyses of currently effective major rules*." (emphasis added).

Regulatory analysis requirements as enforced by the executive branch under S. 1080 could delay deregulatory proceedings by requiring unnecessarily detailed analysis of issues that are not central to the ultimate decision. The opening of new telecommunications markets to competition, for example, might be particularly affected by these requirements. Rapid technological change has created opportunities for new types of communications services and opportunities for new firms to offer these services. Substantial uncertainty often exists as to what services would best serve consumer demand. This uncertainty is clearly a factor in favor of letting market forces operate, but it also compounds the difficulty of preparing a detailed economic analysis concerning the effect of deregulation. At the time a proposal for deregulation is considered, it is often impossible to predict how innovation and competition might shape the industry in the future. Debate over whether the agency correctly identified the likely economic effects of competition would substantially delay deregulatory initiatives, with the result that unnecessary government intrusion into potentially competitive markets would be prolonged.

It is therefore quite reasonable to distinguish between rulemakings that would impose regulation on the economy and those that would permit market forces to operate to meet the public's needs. So long as health, safety, and the environment would not be threatened, the procedures currently in effect for non-major rules would be sufficient to ensure reasoned decisionmaking. Imposing the full regulatory analysis procedures even in cases where an agency is attempting to reduce the burdens of regulation can only serve to protect the *status quo*.

We therefore would urge the Senate to support a deregulatory exemption along the lines of that now included in H.R. 746. We make this recommendation in order that S. 1080, regulatory reform legislation intended to reduce the effects of over-regulation on the economy, will not result in delaying or preventing the abolition of unnecessary, overly burdensome regulation.

Without a deregulatory exemption, an aggressive exercise of the executive oversight provisions by OMB could well limit the independence of the Commission's rulemaking process, just as an aggressive OMB implementation of the Paperwork Reduction Act may limit the information base upon which the agency must rely to formulate reasonable and necessary regulations.4/

4/ The Paperwork Reduction Act of 1980, P.L. 96-511, 44 U.S.C. §3501 *et seq.*, conveyed broad authority on OMB to review and, if necessary, to veto information and recordkeeping requests made of businesses and individuals by all government agencies. Unlike S. 1080, however, the Paperwork Reduction Act does provide the independent agencies with statutory authority to override any OMB veto by a majority vote of agency members. *See* 44 U.S.C. §3507(c). Ironically, the Paperwork Reduction Act, 44 U.S.C. §3506(c)(3), also mandates that each agency assess "the paperwork and reporting burden of proposed legislation affecting" the agency. In our judgment, the potential of S. 1080, including the executive oversight provisions, for proliferating "the paperwork and reporting burden" of the Federal Government, as well as of business and the general public, is stupendous. In its current (footnote continued on next page)

Effect of "Savings Clause"

Finally, you have asked for our views on the effect of the "savings clause" language of section 8 of S. 1080 on the exercise of the executive branch oversight authority mandated by the legislation. Captioned "presidential authority", section 8 provides as follows:

> Nothing in this Act (1) limits the exercise by the President of the authority and responsibility that he otherwise possesses under the Constitution and other laws of the United States with respect to regulatory policies, procedures, and programs of departments, agencies, and offices, or (2) alters in any manner rulemaking authority vested by law in an agency to initiate or complete a rulemaking proceeding, or to issue, modify, or rescind a rule.

For a number of reasons, we believe this language is insufficient to reduce the likelihood of increased executive branch influence on the rulemaking decisions of the independent agencies as a result of the executive oversight provisions of S. 1080. Section 8 is an apparent attempt to demarcate what the executive branch can and cannot do with regard to agency rulemaking. It suggests that the executive branch can dictate agency procedures but not substantive results. Yet, as we have indicated, aggressive exercise of the new procedural authority could well have an adverse effect on an agency's authority to issue new regulations. Moreover, as noted, if OMB can tell an agency which existing rules it should be reviewing and when, OMB would not be merely telling the agency what procedures the agency should follow but also what its substantive priorities should be. Finally, granting such rulemaking oversight authority to the executive branch could clearly modify the mandate Congress delegated to independent agencies such as the FCC, in their organic, enabling statutes, to regulate in the public interest, see, e.g., the Communications Act of 1934, as amended, 47 U.S.C. §303, and to issue "such rules and regulations...as may be necessary" to do so. See, e.g., 47 U.S.C. §§154(i), 303(f).

(footnote continued from previous page)
form, S. 1080 would require the preparation of numerous regulatory analyses, studies, investigations, reports and other written submissions, as well as likely increase data requests imposed upon regulated industries and the public. At a time when the agencies are actively seeking to comply with the letter and spirit of the Paperwork Reduction Act, a procedural regulatory reform bill like S. 1080 would clearly undercut the effort to minimize the paperwork and reporting burdens.

The "savings clause" language is inadequate to remedy these concerns. It is also inconsistent with the overall thrust of the executive oversight provisions which, in the absence of clear judicial review, could enable the President or OMB to use neutral-appearing procedural devices as a vehicle to make substantive modifications in independent agency rulemaking. The "savings clause" language, for example, does not clearly state that OMB cannot alter substantive standards of agency law, although it states generally that S. 1080 does not alter agency "rulemaking authority vested by law." Nor does it allow for judicial review of an action by an executive branch officer if that action interferes with the exercise of independent judgment by an agency and such exercise of independent judgment is contemplated in the applicable authorizing or enabling statute or under established case law. Nor does the "savings clause" in section 8 offer any particular procedural safeguards, such as requiring all executive branch comments on proposed independent agency regulation to be disclosed in the public rulemaking record, or placing a specific time limit on executive branch rulemaking comments so as not to allow the rulemaking process to be subverted by procedural delay.

Only such language and provisions in the proposed statute and accompanying legislative history would be sufficient to negate any possible inference that it is congressional intent to authorize the executive branch to impose procedures on the rulemaking process of the independent agencies, such as OMB pre-adoption review and clearance, which could interfere with the substance and independence of that rulemaking process.

Conclusion

We believe it is appropriate to reiterate the conclusion of our attached letter to Senator Roth of September 4, 1981:

> In sum, there is no assurance that these procedural changes will serve the Committee's regulatory reform goal of eliminating unnecessary regulation. A transfer of oversight authority from Congress to the executive branch cannot itself ensure continuation of the Commission's ongoing deregulatory efforts. See, e.g., Deregulation of Radio, 46 Fed. Reg. 13885 (February 24, 1981). Further, such a transfer would encourage executive branch control over telecommunications policy, a position rejected by the Congress when it assigned responsibility for telecommunications regulation to an independent agency under Congress' direct control.

We would also concur with the following statement of Paul A. Volcker, Chairman of the Board of Governors of the Federal Reserve System, in his letter of September 10, 1981 to Senator Roth on the executive oversight provisions of S. 1080:

This is not to say of course that the regulatory process should not be subject to Congressional scrutiny and to the requirement of the adoption of every step feasible to lighten and simplify the existing regulatory burden as well as the avoidance of unnecessary regulation in the future. These objectives, I wish to reemphasize, can be achieved most efficiently by analysis of individual agency functions rather than through the adoption of new, across-the-board requirements that rigidify and expand regulatory burdens as well as impair basic Congressional policies calling for regulatory independence and expertise through the muitiplication of decision-making layers.

Thank you for this opportunity to make these additional comments on the executive oversight provisions of S. 1080. Please contact us if we can be of any further assistance.

Sincerely yours,

Stephen A. Sharp
General Counsel

Attachments

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FEB 8 1982

IN REPLY REFER TO:
3010

The Honorable William Roth
Chairman, Senate Committee
on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to a request for comments of the Federal Communications Commission on the consensus substitute amendment for S. 1080, the "Regulatory Reform Act," Amendment No. 640, introduced on November 30, 1981, by Sen. Paul Laxalt. I understand that the Senate will shortly begin floor consideration of this legislation. Because of time considerations, the following are the views of the Office of General Counsel, not of the full Commission.

During 1981, this Office commented five separate times on this legislation which seeks to reform agency informal rulemaking procedures and to modify existing Executive Branch and judicial review of agency regulation. I am enclosing copies of these five letters of comment (see Attachments 1-5).

We have reviewed these previous comments in the context of studying the consensus substitute amendment for S. 1080 which Sen. Laxalt introduced this past November. We also have examined Sen. Laxalt's "Explanation of Consensus Substitute for S. 1080" inserted into the Congressional Record December 11, 1981 at S-15129, as well as the reports on the legislation of the Senate Committees on the Judiciary and Governmental Affairs. Based on this review, we have the following additional comments.

This consensus substitute amendment for S. 1080 resolves many of the technical differences between the bill as reported first by the Senate Committee on the Judiciary and then by the Senate Committee on Governmental Affairs. The consensus substitute also makes certain other changes in S. 1080 which we support and have recommended in our previous comments. These include a clarification of the relationship between the bill's regulatory analysis requirements and existing substantive rulemaking standards in agency enabling statutes, and allowance for representatives of affected interests to make oral presentations in "hybrid" informal rulemaking proceedings (see, e.g., our letter dated July 29, 1981 and proposed subsections 622(c)(2)(E), (d)(2)(B), and 553(c)(4) respectively of Amendment 640.)

However, we continue to have serious concerns about significant, unresolved issues which this consensus version of S. 1080 leaves open for ultimate resolution on the Senate floor. Specifically, the consensus amendment includes three major provisions which were reported out by the Committee on the Judiciary but were deleted by the Committee on Governmental Affairs during its markup of the legislation. These are: judicial review of an agency's "major rule" determination, the "Bumpers Amendment", and Executive Branch oversight of independent agency compliance with regulatory analysis requirements. Our comments on and concerns about these three issues are fully set out in the attached five letters. At this time, we would only update our comments with the following additional observations.

With respect to judicial review of the "major rule" determination, we support the position of the Senate Committee on Governmental Affairs which deleted in markup any judicial review of an agency's basically managerial determination whether or not a rule will have a $100 million impact on the economy and therefore be a "major" rule subject to regulatory analysis. We strongly agree with the report of that committee which asserts that such judicial review is unnecessary since "executive and congressional oversight and the good faith of agency officials will be sufficient to assure that the regulatory analysis is performed where appropriate." (Report of the Committee on Governmental Affairs, United States Senate, to accompany S. 1080, the Regulatory Reform Act, 97th Cong., 1st Sess., at 59 (Dec. 16, 1981) (hereinafter "Govt. Affairs Report").

Concerning the Bumpers Amendment, we would point out that since our previous comments on S. 1080, the Administrative Conference of the United States (ACUS) has adopted a recommendation urging Congress not to enact the amendment "in any of its current versions, or any similar across-the-board legislation altering the weight reviewing courts afford agency statutory interpretations or expertise." (See ACUS Recommendation No. 81-2, "Current Versions of the Bumpers Amendment", 1 C.F.R. §305.81-2, Attachment 6.) This advisory body also recommended that "if Congress nevertheless believes it necessary to enact legislation directed to the weight to be accorded administrative interpretations, it should substitute for the currently pending provisions . . . [a] clearer, more effective formulation," similar, in part, to the Bumpers Amendment in the bill version of the Committee on Governmental Affairs. Id. (See Attachment 6 for recommended alternate language.) We support the ACUS recommendation, including the alternate language, and urge its adoption.

Regarding Executive Branch oversight of independent agency compliance with the regulatory analysis requirements of S. 1080, we support the decision voted by the House Judiciary Committee on November 17, 1981 during its markup of H.R. 746, the comparable

House version of S. 1080, to exempt named "independent regulatory agencies," including the Federal Communications Commission, from the Executive Branch oversight requirements of the regulatory reform legislation. We agree with the majority of the House Judiciary Committee that Congress, possibly with the assistance of the General Accounting Office, can sufficiently monitor compliance by independent regulatory agencies. Moreover, as noted during the markup of H.R. 746, granting the Executive Branch oversight authority regarding the independent regulatory agencies could lead to Executive Branch pre-clearance and executive veto of independent agency regulations, thus enabling the Executive Branch to usurp independent agency rulemaking authority and to violate the integrity of the rulemaking process. *See also* Morton Rosenberg, Library of Congress, Congressional Research Service, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues That May Be Raised By Executive Order 12291*, Committee Print, House Energy and Commerce Committee, 97-0, at 72-73 (June 15, 1981) ("A court might rule . . . that the order's failure to protect the integrity of the policymaking process from such influences . . . deprives interested persons of their due process rights . . . and the possibility of effective judicial review.")

Significantly, the Senate Committee on Governmental Affairs voted to preserve the independence and the "traditional status" of the independent agencies by providing that any exercise by the President of Executive Branch oversight authority concerning regulatory analysis compliance shall only constitute a "nonbinding, advisory recommendation" with regard to the independent regulatory agencies. (*See* "Govt. Affairs Report", *supra*, at 65-67.) While we would continue to urge a total exemption from the executive oversight provision for independent regulatory agencies, as voted by the House Judiciary Committee, we could support the formulation of §624 proposed by the Senate Committee on Governmental Affairs rather than the far more intrusive, mandatory compliance proposed by the Senate Committee on the Judiciary.

Finally, we reiterate our basic and consistent position that broad procedural regulatory reform, especially with the high potential for proliferating paperwork requirements, should not be adopted in an effort to achieve the substantive goal of reduced regulation. No procedural device can ensure that agency decisions will comply with the will of Congress. Neither can delegation of congressional policymaking authority to the courts or to the Executive Branch ensure correct implementation of congressional intent; any such action would, in fact, reduce Congress' authority to correct regulatory errors. Only continuous congressional oversight of agency actions and, if necessary, statutory correction of erring agencies can truly accomplish the purposes of S. 1080.

Thank you for the opportunity to present these views.

Sincerely yours,

Stephen A. Sharp
General Counsel

Attachments 1-6

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

September 14, 1981

IN REPLY REFER TO
3010

Honorable William V. Roth
Chairman, Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Chairman Roth:

This letter replies to your request for Federal Communications Commission comment on S. 344, the "Agency Accountability Act of 1981." These comments are based on an initial staff review of the bill and represent only the view of the Commission's General Counsel.

S. 344 is intended to increase agency accountability to Congress by establishing procedures for congressional review of certain agency rulemakings before such rules become effective. Specifically, the bill would provide:

(1) that each agency must prepare an advance agenda of the significant rules it intends to propose over a twelve month period;

(2) that the agency's congressional oversight committees must be sent a copy of each proposed significant rule at the time the rule is sent for publication in the Federal Register;

(3) that no significant rule adopted by informal rulemaking can become effective during a 20-day period after its receipt by the agency's oversight committees; and

(4) that if one of the oversight committees orders reported a joint resolution disapproving the rule or any part thereof, then the rule could not take effect for up to 60 days while Congress considered the resolution.

A "significant" rule is defined as any rule which the agency deems to be significant. Certain factors are listed which the agency must consider. Rules which determine rates of particular applicability are excluded from the bill's requirements. Importantly, agency compliance with the bill's requirements and any agency determination made under these requirements would not be subject to judicial review of any kind.

The express intent of S. 344 is to ensure increased agency accountability and adherence to legislative intent in the issuance of agency rules. Such accountability is clearly a crucial element of democratic government. Therefore, these remarks will only address whether the proposed version of a legislative veto of agencies' rulemaking decisions would be a desirable extension of existing congressional procedures for guiding administrative action.

The proposed legislation would not grant Congress any new authority over administrative agencies. Congress can now nullify or change any agency rule by passing legislation. When congressional intervention is necessary, the traditional legislative process encourages Congress to bring a broad perspective to the problem. Through legislation, Congress can correct any agency misunderstanding of legislative intent and can provide guidance for the agency's future exercise of its discretion. On the other hand, formal congressional intervention at the rulemaking level, without development of a complete legislative history, would necessarily center on the individual action and thus would provide the agency with little guidance for the future.

In addition to its ability to direct the Commission through legislative change, Congress now guides the Federal Communications Commission through regular, in-depth committee oversight. In accord with clear congressional directions, the Commission is conducting a detailed reexamination of its regulatory role. One means now in use is an internal Regulation Review Working Group which is analyzing each Commission rule in order to determine which rules may be abolished. In this regard, the Commission already has made substantial progress in substituting market forces for agency rules to benefit the public interest. See, e.g., Deregulation of Radio, 46 Fed.Reg. 13888 (February 24, 1981); Second Computer Inquiry, 84 FCC 2d 50 (1980). In addition to its continuing internal review, the Commission is working closely with Congress to determine where the agency's authorizing legislation should be modified in order to allow further deregulatory initiatives.

The procedures described in S. 344 do not seem likely to produce a more effective examination of agency actions. Some of the significant problems which would ensue from this type of review of individual agency rulemakings are described below.

The time constraints proposed in S. 344 would inhibit full congressional scrutiny of agency rulemakings. To properly evaluate a typical Commission rulemaking, the technical staff studies or analyses and the comments submitted by interested parties must be reviewed. Given the existing demands on congressional committee resources, the time available under the bill's deadlines frequently would be insufficient for full consideration of the rulemaking and its effect on the agency's future rulemaking discretion.

Even more importantly, to the extent that the congressional review procedures of S. 344 become an integral part of agency rulemaking, the informal rulemaking process itself would be impaired. With these congessional review procedures available, special interest group representatives might simply ignore the agency rulemaking altogether and concentrate their resources on the congressional review process. Then the informed, multi-sided debate necessary for well-reasoned agency decisions would be hampered.

Moreover, the Administrative Conference of the United States has predicted that legislative veto provisions might prompt agencies to conduct advance negotiations with congressional committee or staff members to guarantee congressional approval of a proposed rule. ACUS Recommendations on Legislative Veto of Administrative Regulations, 1 C.F.R. §307.77-1. Obviously, such a practice might undermine the principle that the basis for agency decisionmaking should be the application of agency experience and expertise to the administrative record. Similarly, these negotiations could be conducted privately, undercutting efforts to enhance public participation in rulemakings.

Finally, with respect to the bill's notice requirements, existing procedures provide ample congressional awareness of agency activities. For example, the Commission regularly delivers summaries of its significant actions to its oversight committees on the day such actions are taken. Frequent informal staff contacts and outside sources such as the trade press and industry or consumer groups also guarantee congressional awareness of significant agency activity. The notification procedures of S. 344 would not appear to offer a substantial improvement on this process.

In sum, congressional review of agency actions is necessary to ensure implementation of congressional intent, but the best congressional guidance may be provided through active committee oversight and through affirmative legislation that has been subjected to thoughtful and unhurried consideration. This bill would not grant additional power to Congress, but it would encourage a rulemaking process that could adversely affect agencies and Congress as well as the public's perception of the integrity of the administrative process. S. 344, without offering any real benefits, shares many of the risks and detriments which apply to the other forms of legislative veto. See, Staff of the Comm. on Governmental Affairs, 95th Cong., 1st Sess., Study on Federal Regulation, Vol. II, at 115 (Comm. Print 1977).

Accordingly, these legislative procedures should not be adopted.

Sincerely yours,

Stephen A. Sharp
General Counsel

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

September 4, 1981

IN REPLY REFER TO:
3010

Honorable William V. Roth, Jr.
Chairman, Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Chairman Roth:

This will respond to your letter of July 30, 1981, seeking Commission comment on the Executive Branch oversight provisions contained in S. 1080, as ordered reported by the Senate Judiciary Committee.* In particular, you request comment on proposed section 624 of S. 1080 which would authorize the President to "establish procedures for agency compliance" both with S. 1080's new requirements for major rulemakings and with the existing requirements of the Regulatory Flexibility Act (P.L. 96-354). You further note that this authority could permit extension to independent agencies of those oversight provisions now applicable to Executive Branch agencies under section 3 of Executive Order 12291.

Among other requirements, section 3 of the Executive Order mandates the submission of proposed agency rules to the Office of Management and Budget (OMB) for review and clearance prior to adoption. The relevant issue in such an OMB review would be the adequacy of the agency's cost-benefit analysis -- a matter inextricably tied to the substance of the agency proceeding. This nominally procedural review thus clearly could be used to direct substantive agency decisionmaking.

Grant of such rulemaking oversight authority to the Executive Branch would modify the mandate Congress granted the Federal Communications Commission in the Communications Act of 1934, as amended. That Act grants the Commission broad authority to regulate broadcasting in the public interest. See 47 U.S.C. § 303;

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* For a general discussion of the provisions of S. 1080 as they would affect the Federal Communications Commission, see Chairman Mark Fowler's letter to your Committee dated June 1, 1981 (copy enclosed). Also enclosed for your information is a copy of the July 29, 1981, letter from the Commission's General Counsel to Senator Paul Laxalt, Chairman of the Senate Judiciary Committee, suggesting language for inclusion in that committee's report on S. 1080.

NBC v. United States, 319 U.S. 190, 214-221 (1943). And, to accomplish its mission, the Act authorizes the Commission to issue such rules and regulations as may be necessary. 47 U.S.C. §§ 154(i), 303(f). Importantly, the Act also requires the Commission to regulate broadcast programming, including political programming, for certain purposes. See 47 U.S.C. §§ 315 and 312(a)(7). For this broad authority over mass communications media to be shared with the Executive Branch in any manner would appear to conflict with Congress' clear intent to segregate the Commission from Executive Branch control.

When it delegated authority over radio to an independent agency (the Commission's predecessor, the Federal Radio Commission), Congress expressly recognized the potential influence of this fledgling medium, and the relevant Senate Commerce Committee report declared both that regulation of radio "should not be entrusted to any one person or to any administrative department of the government" and that regulatory power over radio should be "as free from political influence and arbitrary control as possible." S. Rep. No. 772, 69th Cong., 1st Sess. 2 (1926). The validity of these concerns has increased dramatically, as indicated by recent polls which indicate that most Americans perceive television to be their most important source of news. See, e.g., Roper Organization, Changing Public Attitudes Toward Television and Other Mass Media: 1959 to 1976, at 3 (New York, Television Information Office, May 1977).

The present system for formulation of telecommunications policy through public exchange of views among members of a collegial body serves as a major protection against any abuse of government power. Similarly, any incentive for adoption of politically motivated rules is reduced by the fact that the necessary political oversight of this regulatory process is performed by Congress -- whose members' political aims are relatively diverse -- rather than the Executive Branch. Given the evident persuasive power of television, even limited authority to affect the resolution of politically sensitive First Amendment issues should not be conferred upon the Executive Branch.

That the goal of S. 1080 is to eliminate unnecessary government activity does not resolve the potential problems associated with increased Executive Branch control over the Commission. The bill does not ensure that OMB would not someday use its new authority to reject agency proposals which fail to go far enough toward a particular Executive Branch regulatory goal. In addition, the extent of OMB authority over independent agencies is subject to some confusion. See, e.g., Staff of Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess., Study on Federal Regulation, Vol. 5, at 43-52 (Comm. Print 1977). S. 1080 could be interpreted to imply the existence of a far broader Executive Branch authority over independent agencies than is granted expressly. This is of particular concern in the case of the Federal Communications Commission due to its unique responsibility to address First Amendment issues in the course of its regulatory decisionmaking.

In sum, there is no assurance that these procedural changes will serve the Committee's regulatory reform goal of eliminating unnecessary regulation. A transfer of oversight authority from Congress to the Executive Branch cannot itself ensure continuation of the Commission's ongoing deregulatory efforts. *See, e.g.*, *Deregulation of Radio*, 46 *Fed. Reg.* 13888 (February 24, 1981). Further, such a transfer would encourage Executive Branch control over telecommunications policy, a position rejected by the Congress when it assigned responsibility for telecommunications regulation to an independent agency under Congress' direct control.

Thank you for seeking the Commission's views on this important legislation. I wish to emphasize that, due to time limitations, the Commission has not taken a formal position on this subject, and the views expressed herein are therefore the views of the Commission's General Counsel.

Sincerely yours,

Stephen A. Sharp
General Counsel

Enclosures

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

July 29, 1981

IN REPLY REFER TO:
3010

Honorable Paul Laxalt
Chairman, Subcommittee on Regulatory Reform
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Laxalt:

This letter responds to your informal invitation to suggest language for inclusion in the Senate Judiciary Committee's report on S. 1080, the "Regulatory Reform Act of 1981." On July 14, 1981, the Committee ordered S. 1080 to be reported.

As we have discussed, the Federal Communications Commission shares the Judiciary Committee's concern that all unnecessary regulation must be eliminated. The Commission already has reduced substantially the role of regulation in the telecommunications industry, and I assure you that its deregulatory efforts -- under congressional guidance -- have only begun.

Unfortunately, the provisions of S. 1080 could seriously interfere with the Commission's ability to fulfill its responsibilities under the Communications Act. Briefly, the three areas of principal concern are:

(1) the heavy procedural burden which S. 1080 would apply to informal agency rulemakings (including those rulemakings to streamline or terminate regulation);

(2) the significant revision of the delicately balanced relationship between the Commission and the executive branch; and

(3) the potential for increased judicial intervention in agency policymaking under the Bumpers amendment.

These concerns are described in more detail in a letter from the Commission's Office of General Counsel which responded to a request from the Office of Management and Budget for the agency's views on S. 1080. (Letter from Marjorie S. Reed to Robert E. Carlstrom, May 21, 1981 -- copy enclosed.) I am hopeful that some of these problems may be alleviated by careful explanatory language in the Judiciary Committee's report, and I ask you to consider the following proposals.

(1) Procedural issues.

(a) Deregulatory rulemakings.

Section 622* prescribes standards for preparing cost-benefit analyses in major rulemakings. Preparation of such analyses will, in some ways, be more difficult for deregulatory rulemaking, because it is unavoidable that descriptions of the benefits of deregulatory actions will be more uncertain than descriptions of the benefits to be expected from regulation. Just as there are hidden costs of regulation, there are hidden benefits to deregulation which defy evaluation in cost-benefit analyses (e.g., increased incentives for innovation and the elimination of regulatory delay costs). The benefits expected from economic regulation necessarily are easier to describe because such regulation must be based upon economic planning and prediction, while deregulation requires the avoidance of centralized planning. Accordingly, the identifiable advantages of nonessential economic regulation may appear, from some perspectives, to outweigh the uncertainties and imperfections of reliance on marketplace forces. See, for example, the opinion of the D.C. Circuit in WNCN Listeners Guild v. FCC, 610 F. 2d 838 (D.C. Cir. 1979), rev'd, __ U.S. __, 101 S.Ct. 1266, 67 L.Ed. 2d 520 (1981).

The delayed effective date of S. 1080 represents an implicit recognition of the difficulties presented by S. 1080 to the achievement of needed deregulation. This solution is insufficient, however, because even beyond this delayed effective date, advancing technology will continue to provide new communications services which will increase potential competition and decrease the need for government regulation. Continuous reduction of the scope of government involvement in communications thus will be necessary, and such revisions must be accomplished through rulemaking.

To support agency reliance on competition as a substitute for economic regulation, I suggest that the report's discussion of section 622 should demonstrate the Committee's recognition of this problem and describe the Committee's intent that uncertainty concerning all the effects of competition should not discourage efforts to eliminate unnecessary regulation.

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* Except as otherwise noted, section numbers refer to proposed new or amended sections of Title 5, United States Code, as contained in Committee Print No. 2 of S. 1080, July 17, 1981.

Sample language:

The Committee wishes to stress that the analysis requirements of section 622 are not intended to protect existing regulation by increasing the burden on an agency which proposes to substitute increased competition for reliance upon economic regulation. The Committee fully recognizes that the benefits of competition are not subject to precise evaluation and that elimination of the hidden costs of regulation generally will constitute a substantial benefit beyond such apparent benefits as the elimination of direct compliance costs. The Committee thus expects agencies and courts reviewing agency decisions to consider the "hidden" benefits of competition (such as an increased opportunity for innovation and the potential for a far prompter response to market needs) when describing or evaluating the benefits of a deregulatory action. It is government intrusion into the economics of the marketplace which must be justified, whether the rulemaking is one to impose a regulation or one to remove existing restrictions.

(b) Scope of the definition of a major rule.

I am also concerned that the procedural requirements of S. 1080 might render it far more difficult for the Commission to authorize new types of communications services through rulemaking. Under the Communications Act, the Commission is responsible for the allocation of electromagnetic spectrum space to non-government uses. The ongoing technological revolution in telecommunications continually makes possible more sophisticated means of employing the spectrum, and prompt decisionmaking is essential to providing the public with the benefits of these services.

The electromagnetic spectrum is a limited resource, however, and generally there are competing options for the use of particular frequencies. Often the choice among these options is of relatively minor importance to the service to be provided the public, but it is of major concern to potential suppliers of the new service or to other parties whose economic interests will be affected directly. If such procedures as the authorization of a new class of broadcast station or of a new common carrier service must be treated as major rules, the necessary procedural requirements and the necessity for a formal selection of the most cost-effective proposal could result in interminable delays to such authorizations.

It appears that the Committee intends to avoid such delays because the bill's definition of a "major" rule contains a provision in section 621(3)(A)(i)(b) which exempts "a rule that authorizes the introduction into commerce or recognizes the marketable status of a product or service that, pursuant to statute, could not lawfully be introduced into commerce or marketed in the absence of a rule." It would be very beneficial to the Commission to express the Committee's intent that new communications services are included within this exception.

Sample language:

> Subsection 621(3)(A)(i)(b) is intended to exclude from the definition of a major rule such essential regulatory funtions as the authorization of a new communications service or the modification of standards for an existing service by the Federal Communications Commission. This exemption does not extend, however, to the imposition of performance requirements or other regulatory burdens on the persons authorized to perform such services. Costs of compliance or other effects of regulatory requirements should be considered separately from the non-regulatory costs or effects of providing the communications service, and if the regulatory burdens alone would warrant treatment as a major rule, then those aspects of the rulemaking shall be subject to the requirements applicable to a major rule.

(c) Judicial review of an agency determination that a rule is not a major rule.

Section 623 is not clear concerning whether an agency determination that a proposed rule is not a major rule is subject to judicial review. If the agency's determination is made under the $100,000,000 enforcement and compliance costs standard of section 621(3)(A)(i), then judicial review clearly is allowed; if a determination is made that the rule is a major rule under the subjective standards of section 621(3)(B), then judicial review is expressly prohibited; but if the agency's decision under section 621(3)(B) is that the rule is not a major rule, then no mention is made of whether or not judicial review is applicable. Because section 623(a) excludes judicial review of agency compliance except "according to the provisions" of section 623, judicial review of such an agency decision that a rule is not major would appear to be prohibited, but an issue is raised because such agency decisions are omitted from the express exemption granted to a agency decision that a rule is major under the section 621(3)(B) standard.

The criteria prescribed by section 621(3)(B) are necessarily subjective because they require a determination as to whether particular adverse effects would be "significant" and as to whether an expected increase in costs or prices would be "substantial." Such determinations vary depending on the frame of reference selected. Judicial review would invite the substitution of a judicial policy decision for that of the expert agency and would allow a reviewing court to reverse an agency decision without any necessity to reach the substantive merits of the proceeding. Such judicial intrusions should not be encouraged, and a sentence should be included in the report which expressly indicates that no judicial review is contemplated of any agency decision under the section 621(3)(B) standard.

(d) Hybrid rulemaking.

Section 553(d) directs agencies to give interested persons an opportunity to participate and states that for major rules this opportunity shall include the opportunity to make oral presentations and, if necessary for the resolution of a material fact issue, to engage in direct and cross-examination of witnesses. The agency would be allowed to establish "reasonable procedures to regulate the course of informal public hearings to ensure an orderly and expeditious hearing."

It is essential that the report clarify (1) that agencies may select representative groups to present oral presentations and (2) that this section does not grant every interested individual the right to make an oral presentation to the agency. Such a right would be extremely disruptive to the rulemaking process in controversial cases. During the Commission's recent rulemaking to deregulate commercial broadcast radio, for example, very large numbers of persons expressed interest in appearing before the Commission. In that proceeding, the Commission employed a panel discussion among invited parties to help focus the issues. The advantages of such an oral presentation would be lost, however, if it were used merely as an inefficient, supplementary means to convey information to the decisionmaker.

Sample language:

> The agency shall control the extent and format of any oral presentation of data, views, and information at any informal public hearing. If necessary or desirable for an expeditious proceeding, the agency may select representatives of significant viewpoints from among the interested parties who seek to participate in the oral proceeding. Nothing in this Act should be construed to give every interested person the right to make an oral presentation to the agency.

(2) Presidential oversight of independent agency rulemaking.

The Commission has consistently expressed its concern over congressional proposals to alter the delicate balance of forces which protect its decisionmaking processes from dominance by the executive branch. It is particularly important that this Commission, which occupies a critical governmental role with respect to the control of information through the communications media, should maintain a unique independence from the Executive due to sensitivity to First Amendment concerns.

Executive branch authority to prescribe agency procedures under section 624, coupled with executive branch authority to designate particular proposed rules as major rules subject to those procedures under section 622, offers the possibility for extensive influence on substantive agency rulemaking decisions despite the "savings clause" language of section 7 of the Act which states generally that rulemaking authority vested by law in agencies is not altered by S. 1080. As drafted, S. 1080 could be interpreted to allow the executive branch to adopt procedures which demand that independent agencies submit their proposed rules for pre-clearance by OMB. The report should negate any possible inference that the Committee contemplates the imposition of procedures which could interfere with this independent agency's substantive decisionmaking.

In addition, this new executive branch authority should not be coupled with the total elimination of judicial review of the exercise of such authority. Section 624(c) provides that the exercise of authority granted by that section "shall not be subject to judicial review in any manner under this Act." The report should state that this exemption is not intended to preclude judicial review of an action by an executive branch officer if that action interferes with the exercise of independent judgment by an agency and such exercise of independent judgment is contemplated in the applicable authorizing statute or under established case law.

(3) Bumpers amendment.

S. 1080 would revise section 706 of the Administrative Procedure Act, the basic standard for judicial review of any agency action. These modifications, known collectively as the Bumpers amendment, would open numerous possibilities for encouraging the overruling of an agency's policy decision and the substitution of a judicial interpretation of congressional intent.

Interpretation of this amendment would be particularly difficult for the courts because of the tortured history of this proposal. During congressional consideration of the Bumpers amendment, almost every key word was the subject of negotiation and subsequent revision. Accordingly, very careful attention must be paid to the Committee report language in an effort to assist reviewing courts in determining congressional intent.

To avoid the potential disruptions of the administrative process described in the attached substantive comments on

S. 1080, I urge that the carefully composed language contained in the House Judiciary Committee's report on H.R. 3263 (96th Cong.) be incorporated into the Senate Judiciary Committee's report with only the necessary technical changes. (H.R. Rep. No. 96-1393, 96th Cong., 2nd Sess. 53-55 (1980) -- copy attached.)

* * *

In addition, several other points warrant mention. It is unclear to me why the exemptions in section 621(3)(A)(ii), are not applied to section 621(3)(B) as well. As noted above, the Commission employs rule making in allocating frequencies among types of uses, and it also has treated rate cases as rulemakings. The broad language of section 621(3)(B)(iii) would suggest that the exemptions could be employed effectively in that subsection.

Section 623(d) uses the word "legality" in line 23 on page 45 of Committee Print No. 2. This appears to mean that the absence of an analysis (required by law) would require reversal by the reviewing court. The report should explain "legality" to mean the analysis shall be considered by a court in determining whether the agency acted arbitrarily and capriciously in enacting the rule.

Similarly, section 706(a)(2)(D) uses the term "by law." This section tracks existing statutory language, but, in light of the bill's new emphasis on procedures and the history of judicial disputes over agency procedures (culminating in the Vermont Yankee decision, 435 U.S. 519 (1978)), you may want to explain that this language refers only to statutory "law" rather than procedures prescribed by a court or by the agency itself. Report language would also be useful to make clear that the burden established in section 706(a)(2)(F) should always be to justify the rule's existence.

Your consideration of these comments and suggestions is appreciated. Please contact me if I can be of any further assistance.

Sincerely yours,

Stephen A. Sharp
General Counsel

Attachments

96TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
No. 96-1393

REGULATION REFORM ACT OF 1980

SEPTEMBER 25, 1980.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. DANIELSON, from the Committee on the Judiciary, submitted the following

REPORT

together with

SUPPLEMENTAL

and

DISSENTING VIEWS

[To accompany H.R. 3263]

[Including Cost Estimate of the Congressional Budget Office]

The Committee on the Judiciary to whom was referred the bill (H.R. 3263) to make regulations more cost-effective, to ensure periodic review of old rules, to improve regulatory planning and management, to eliminate needless legal formality and delay, to enhance public participation in the regulatory process, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass

The amendments are as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SHORT TITLE

SECTION 1. This Act may be cited as the "Regulation Reform Act of 1980".

~~ing panel under the expedited procedures of new section 555 of title 5.~~

~~Where adversary-type proceedings are the subject to review by a board, the Committee prefers that the agency give priority to one or more members of the agency. This approach would lessen separation of functions problems that could arise where an agency employee serving on the board holds a supervisory position with respect to agency staff involved in the particular case. It is not the purpose of a review board to provide an additional advocate in adversary-type proceedings.~~

~~In order to avoid unnecessary layers of review, the bill limits the levels of review by the agency to two. Thus a presiding employee's decision could, at the most, be reviewed by one review board and by the agency head or commissioners. Normally, though, there would be no more than one level of review within the agency.~~

~~Finally, the amendment does not supersede any preexisting provision of law governing a particular agency's ability to create review boards or to delegate a final decision to one or more of its members or other employees.~~

Scope of judicial review

The Committee adopted an amendment to section 706, title 5 of the United States Code, to clarify the duties of courts in reviewing agency action. The language adopted by the Committee is designed to express the Committee's intent to ensure careful judicial review. The amendment recognizes that agencies are often delegated broad powers by Congress and that courts are charged with assuring that agencies act within the bounds of these delegations.

The Committee recognizes, at the same time, that Congress has established administrative agencies in order to achieve certain public goals that could not be achieved without them. What must be sought is a proper balance between the court and the agency, with each striving to implement the intent of the democratically elected legislature while respecting the province of the other.

This amendment designates all of existing section 706 except the last sentence as a new subsection (a), and designates the last sentence as a new subsection (b). Three main substantive additions to the existing statutory language are made: one is the addition of the word "independently" in the first sentence of section 706(a); another is the addition of a new subsection (c); the third is the addition of a new subsection (2)(F) (and resultant redesignation of existing (2)(F) as (2)(G)). The intent of all of these changes is to reaffirm that courts are to subject agency action to "searching and careful" and "thorough, probing, in-depth review." *Citizens to Preserve Overton Park, Inc.* v. *FTC*, 612 F.2d 658 (2d Cir. 1979).

By inserting the word "independently" in the first sentence of section 706, the Committee intends to underscore that courts should not uncritically defer to agency determinations of law. Instead, they should take an independent look at the legal issues presented for review, and reach their own judgment regarding them.

New subsection (c) provides that when a court reviews agency action challenged as in excess of statutory jurisdiction, authority or limitations, or short of statutory language, and any other indications of legislative intent, the court shall examine the language of the statute or, in the event of ambiguity, other evidence of legislative intent to determine if the agency has acted appropriately.

The Committee recognizes that if a court looks only at the words of a statute, there may be ambiguity about an agency's authority to act. Statutes frequently are written in general terms that do not address the multiplicity of situations that agencies will encounter in implementing law. The Supreme Court has long recognized that "the determinations of facts and the inferences to be drawn from them in light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy with the prescribed statutory framework." *Yakus* v. *United States,* 321 U.S. 414, 425 (1944). Whether an agency action is within the area of lawful discretion is frequently a question requiring resort not only to the statutory text, but also to all relevant indications of legislative intent.

The phrase "ascertainable legislative intent" in subsection (c) is intended as a reference to the statute's meaning as reflected in statutory language, the statute's purposes and legislative history. The decision whether, in a particular case, a certain document, report, transcript of a debate, or other item is a helpful indicator of Congressional intent is for the court to make. The Committee takes note of, and does not intend to change, the normal canons of statutory construction that have evolved through the years.

Subsection (c) also provides that in reviewing questions of law under section 706, title 5 of the United States Code, as distinguished from questions of fact or discretion, a court shall not accord any presumption in favor of or against agency action. This provision is intended to assure that courts will not assume that agency interpretations of law are correct. Courts are to be neutral in the sense that they are to evaluate independently any differing interpretations of law without simply presuming that one or the other is correct.

This amendment expressly recognizes that a reviewing court should not treat questions of law the same as questions of fact or questions of policy. When a mixed question of law, policy and fact is raised, the court should take care not to intrude into the agency's realm of discretion with respect to policy and factual matters. Agencies are established in order to provide the benefits of expert, specialized decisionmaking regarding complex issues of fact and policy.

Furthermore, although courts are not to accord any presumption in favor of agency action, this does not mean that a court cannot, on the basis of its careful evaluation of the statute and the circumstances of a case, give weight to an agency's interpretation of its authorizing legislation. In a particular case, a court may give weight to an agency's interpretation of its own statute that is consistent with the legislative record, because agencies have specialized knowledge of and exposure to the subject of the Congressional enactment. *See, e.g., NLRB* v. *Seven-up Bottling Co.,* 344 U.S. 344, 349 (1953): *Wilderness Society* v. *Morton* 479 F.2d 842, 866 (D.C. Cir.) (en banc) *cert. denied,* 411 U.S. 197 (1973).

No adverse implication regarding the legality of an agency's action, prior to an adverse judicial ruling on the issue, should be drawn from any language in this amendment. This amendment expresses the Committee's sense of the appropriate stance to be taken by courts in deciding particular cases, and it should not be viewed as placing any agency action under a cloud of doubt regarding its validity or legality. Unless and until a court rules otherwise, agency action has the same force and effect of law under this amendment as it always has had.

New subsection (2)(F) of section 706 is consistent with recommendations of the Administrative Conference regarding the necessary factual basis for those rulemakings subject to section 553 of title 5, United States Code:

> 3. The appropriate standard for determining whether a rule of general applicability adopted after informal rulemaking rests on an adequate foundation is stated 5 U.S.C. section 706(2)(A) (redesignated by this Amendment as section 706(a)(2)(A)), which provides that a reviewing court must set aside action found to be "arbitrary, capricious (or) an abuse of discretion" where such a rule is attacked on the ground that an asserted factual basis does not support it or that a necessary factual foundation is lacking, this standard requires a reviewing court to decide, in light of the information before it . . . whether the agency's conclusions concerning the significance of factual information can be said to be rationally supported. Recommendation 74-4 of the Administrative Conference of the United States, 1 CFR 305.74.4, adopted May 30-31, 1974.

By using the term "substantial support," the Committee does not intend that courts should adopt a "substantial evidence" test for informal rulemaking under 5 U.S.C. 533. Many, if not most, of the crucial determinations pertinent to informal rulemaking are of a general policy nature. They do not turn on the existence or nonexistence of specific "facts" so much as they turn on the evaluation of probabilities, the balancing of objectives and the selection of methods to achieve given ends within the statutory limits.

This substantial support must be found in the rulemaking file, viewed as a whole. The words "substantial support", which are used in place of the Administrative Conference suggestion of "rationally supported", are intended to require that the materials on which an agency bases its factual determination are reliable and credible. The court shall review the file to see whether or not it contains sufficient facts and documentation so as to represent an adequate foundation for the rule.

The Committee does not intend that agencies must adopt more formalized procedures in order to sustain their rules under this standard. In particular, the Committee does not intend, by adopting (2)(F), to impose any additional requirements on agencies involving the compilation of rulemaking files beyond those required in new section 553(f), which requires the establishment of such files.

The Committee does not intend by any of the provisions of this section to shift existing burdens of proof.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

Honorable William V. Roth, Jr.
Chairman, Committee on
Governmental Affairs
United States Senate
Washington, D.C. 20510

Attention: Miss Pauline Hildebrandt

Dear Chairman Roth:

In response to your letter of May 14, 1981 requesting comments on S. 1080, the "Regulatory Reform Act," I have enclosed the comments previously prepared by the Commission's Office of General Counsel and submitted to the Office of Management and Budget.

If I can be of further assistance, please feel free to contact me.

Sincerely,

Mark S. Fowler

Mark S. Fowler
Chairman

Enclosure

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

May 21, 1981

IN REPLY REFER TO:
3010

Mr. Robert E. Carlstrom
Office of Legislative Reference
Office of Management and Budget
7220 New Executive Office Building
Washington, D.C. 20503

Dear Mr. Carlstrom:

This will reply to your request of May 11, 1981 for comment by the Federal Communications Commission on S. 1080, the "Regulatory Reform Act of 1981." Because of time limitations, these comments are based upon an initial staff review of the bill and represent only the views of the Commission's Office of General Counsel.

In brief, S. 1080 would require regulatory agencies to perform cost-benefit analyses before adopting any new "major" rules and to review all existing "major" rules within 10 years under the cost-benefit standard. A "major" rule is defined in the bill as a rule or set of related rules which would cause (1) an annual effect on the economy of $100,000,000 or more, (2) a substantial increase in costs or prices, or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of domestic enterprises to compete in domestic or export markets. Further, the bill expressly exempts from judicial review the adequacy of agency statements which assess these costs and benefits.

S. 1080 also would:

(1) authorize the President or his designee to select agency rules, promulgated after the effective date of this Act, which the agency then would be required to review as major rules in addition to the major rules selected by the agency;

(2) require agencies to provide interested persons with an opportunity to present oral presentations in major informal rulemakings; and

(3) revise the standards for judicial review of agency actions by adopting a version of the "Bumpers amendment."

This Commission has been in the forefront of the deregulatory movement and fully supports the goal of S. 1080--that unnecessary regulation be eliminated. The broad procedural changes of S. 1080, however, would not help accomplish that goal. The provisions of this bill would greatly reduce the efficiency with which necessary government decisions can be made. S. 1080, in fact, would encourage inappropriate regulation because it would delay and hinder regulatory agencies' efforts to adapt outmoded regulation to changed market conditions which continuously result from technological innovation and other factors.

Necessary agency actions--such as the Commission's recent authorization of cellular mobile communications services--could be delayed or even prevented by formal analysis requirements which would absorb limited agency resources. In the cellular proceeding, for example, the Commission had to choose among a variety of potential options concerning both the amount of spectrum space needed and the role of wireline carriers versus that of radio common carriers in offering this new service. The efficient spectrum use offered by cellular systems will allow great expansion in the mobile communications field (e.g., car telephones). Formal Commission assessment of the costs and benefits of each reasonable alternative would have been both expensive and unreliable because the nature of the demand for the various potential services cannot yet be determined. Also, to delay a decision until fuller information was available would favor foreign manufacturers of mobile telecommunications equipment because such cellular systems are already in operation in Japan.

To avoid the very serious adverse consequences of delayed service and lost technological experience, some regulatory decisions must be made without obtaining complete information on all the decision's potential effects. In the rapidly evolving environment of telecommunications, it often would be self-defeating to delay regulatory action until sufficient information is available to meet the analysis requirements of S. 1080.

Congress also should consider the costs that compliance with S. 1080 would impose on regulatory agencies whose resources have been significantly reduced. Analysis of the costs and benefits of a proposed rule is the essence of rulemaking, but performance of the formal analysis procedures and quantifications prescribed by S. 1080 would require very significant amounts of diminishing agency resources. The formal review of existing rules required by the bill also would divert agency resources from consideration of pressing substantive issues.

In light of the major changes now being implemented by the new administration to reduce overregulation, Congress should consider waiting to examine the effects of Executive Order 12291 before prescribing such major revisions to the Administrative Procedure Act. Experience gained under the cost-benefit analysis requirements of the Executive Order could suggest alternative approaches which might better serve government, regulated interests, and the public.

S. 1080 very soundly exempts the adequacy of an agency's cost-benefit assessment from separate judicial review, but this exemption must be extended further to preclude judicial review of an agency determination that a particular rule is not a "major" rule. Otherwise, agencies will be pressured to treat almost every rule as a "major" rule which is subject to all the bill's procedural requirements. Under S. 1080, as drafted, agencies would be required to develop very liberal estimates of proposed rules' direct and indirect effects because each agency would fear subsequent invalidation of its rules solely on the basis of failure to comply with the procedural requirements for a major rule.

Determining what rules are "major" would be extremely difficult under the definition of a major rule which is contained in S. 1080. Under the bill, a rule is to be treated as a major rule if it causes or would cause "substantial" increases in costs or prices or "significant" adverse effects on particular listed interests. These adjectives provide little guidance to the agency because they are imprecise and because use of these terms requires the subjective selection of a frame of reference in which the "significance" or the "substance" of the effect can be judged. Judicial review under such criteria invites the substitution of a judicial policy decision for that of the expert agency because the court would not need to explain substantive reasons for reversal; it could simply rely upon its determination that the agency failed to meet its procedural responsibilities.

Even under a more precise definition, it would often be difficult for an agency to conclude--with sufficient assurance to risk judicial review--that the effects of a particular rule will not be "major." The effects of a particular act of regulation can only be estimated by predicting what might have occurred had the agency acted differently, and a very large number of factors are likely to be relevant to this prediction. It would be difficult even to estimate anticipated costs of compliance or other effects which could be traced directly to the rulemaking because such a determination must be based upon incomplete and challengeable data, much of which could be obtained only from regulated parties who would have a pecuniary interest in the results of the proceeding. Agencies could well conclude that, in general, it would be preferable to perform all the procedural requirements for a major rule rather than to take the risk that the rule might be invalidated on appeal for failure to comply with procedures required by law.

In Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council, 435 U.S. 519 (1978), the Supreme Court sought to terminate excessive judicial intrusions into agency procedural decisions, suggesting that such intervention was being used indirectly to affect substantive agency decisionmaking. The opportunity for substituting procedural review for review on the merits would be reopened by requiring judicial review of the agency's choice of which rules are major. Congressional oversight can provide an adequate check on independent agency performance of these procedural requirements. The determination of whether a rule is major clearly should be exempted from judicial review.

S. 1080 also provides that the President or his designee may exert control over independent agencies' choice of rules for formal reexamination. This authority to require reconsideration of independent agency rulemaking decisions would seriously erode independent agencies' autonomy from executive branch dominance. Further, the casual delegation of this new authority to the President might be interpreted to imply the existence of far broader executive branch authority over independent agency decisionmaking than is granted expressly.

Before limiting the independence of the independent regulatory agencies in this manner, Congress should carefully consider the historical and policy reasons for the existence of each independent regulatory agency. These reasons include the necessity for Congress to delegate highly technical, regulatory decisionmaking to specialized administrative bodies with particular expertise and, above all, Congress' desire to remove certain types of government decisionmaking, such as radio and television licensing, from executive branch control. The benefits of the independent regulatory commission form, such as continuity of regulatory policy development and the pooling of collective expertise in making difficult, technical decisions, would be compromised by executive branch control. The collegial, bipartisan composition which characterizes independent regulatory agencies and which assures the above noted benefits is worth preserving, and S. 1080 could allow the executive branch to unduly interfere with the orderly and politically independent decisionmaking process of regulatory agencies such as the FCC.

The serious difficulties raised by the Bumpers amendment and by the bill's proposed creation of a right for interested persons to make oral presentations in major informal rulemakings are addressed in my comments on Senator Bumpers' bill, S. 67. I enclose a copy of these comments for your convenience.

It has been this Commission's consistent position that broad, procedural regulatory reform should not be adopted in an effort to achieve the substantive goal of reduced regulation. No procedural device can ensure that agency decisions will comply with the will of Congress. Neither can delegation of congressional policymaking authority to the courts or to the executive branch ensure correct implementation of congressional intent; any such action would, in fact, reduce Congress' authority to correct regulatory errors. Only statutory correction of errant agencies and continuous congressional oversight of agency actions can accomplish the purposes of this bill.

Thank you for the opportunity to present these views.

Sincerely yours,

Marjorie S. Reed

Marjorie S. Reed
Acting General Counsel

Enclosure

FEDERAL DEPOSIT INSURANCE CORPORATION, Washington, D.C. 20429

OFFICE OF CONGRESSIONAL RELATIONS

August 24, 1981

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
3306 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Mr. Chairman:

This responds to your July 30 letter requesting our views on S. 1080, the "Regulatory Reform Act." Your letter points out specifically that, as reported on July 17 by the Senate Judiciary Committee, S. 1080 would subject independent regulatory agencies such as the FDIC to regulatory oversight requirements of the type imposed last February on Executive Branch agencies by Executive Order 12299.

The bill would require virtually all Federal agencies to analyze the costs and benefits of any rules which they determine will impose on business $100 million in annual compliance costs or which they determine, for other reasons, warrant such an analysis. The President would have power to designate any agency rule meeting the $100 million test to be a "major" rule subject to the cost-benefit analysis and, for other reasons, could designate up to 75 rules annually to be "major." He would also have authority to establish procedures to assure that cost-benefit analyses are properly performed.

The agencies would retain authority over the substantive content of their regulations, but S. 1080 would require that they choose the most cost-effective manner of achieving a regulatory objective. Outside parties could bring suit if they believed the agency was not designating a rule as major under the $100 million standard in order to avoid the required cost-benefit analysis. However, cost-benefit analyses themselves could be judicially reviewed only as part of the whole rule making record in an adjudication on the legality of the rule.

S. 1080 would establish a special procedure for promulgating emergency rules that become immediately effective pending subsequent full compliance with the cost-benefit analysis procedures, if delay would seriously injure an important public interest or damage private interests without serving any important public interest.

The bill would also require informal public hearings for proposed major rules, with opportunity for cross-examination, and would amend the scope of review provisions of the Administrative Procedure Act to give courts the power to set aside agency rules found to be without substantial factual support in the rule making record and to eliminate the present presumption in favor of agency action on questions of law. Finally, S. 1080 would establish a procedure requiring agencies to review outstanding major rules within ten years and, after appropriate cost-benefit analyses, to determine whether to renew, amend or rescind such rules.

While the objectives of eliminating unnecessary regulatory burdens, increasing public participation in the formulation of regulations and generally expediting the regulatory process should certainly command high priority in the Executive Branch, we doubt that codification of the detailed procedural rules in S. 1080 is the most efficient and cost-effective method of achieving these objectives.

We believe that such objectives could be more economically and more effectively achieved under existing Executive Orders. In furtherance of these objectives, for example, the FDIC has voluntarily instituted a policy which requires the review of existing regulations at least once every five years to determine whether they should be continued, modified or eliminated. Additionally, the FDIC established a task force and internal procedures to assure that regulations are clearly written, that their need and purposes are clearly established, that the public is afforded a meaningful opportunity to participate in the rulemaking process, that alternative approaches are considered, and that burdens imposed on the public are minimized.

In addition to increasing cost and delays in the rulemaking process, the procedures in S. 1080 could be confusing to the general public. We believe that the provisions of the Administrative Procedure Act are presently adequate to provide public notice of and participation in agency rulemaking. Implementation of the procedures required by the bill could necessitate additional personnel and additional regulations which would seem to contravene the bill's purpose of reducing regulation and administrative red tape.

Based on our experience, there seems to be no need for such a complex procedure as described in S. 1080. The same results could be achieved in other ways under existing law. We would therefore prefer not to see the FDIC's regulatory process encumbered by the requirements of S. 1080.

Sincerely,

Walter P. Doyle

Walter P. Doyle
Legislative Counsel

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON 20426

OCT 2 1981

SEP 28 1981

Honorable William V. Roth, Jr.
Chairman, Committee on
Governmental Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

In our discussion of September 11, 1981, you asked about the impact of S.1080 (the regulatory reform proposal now before your Committee) on the administration of this Commission. The enclosed memorandum, prepared by Commission Staff, provides some information in this regard. Although it is being given to you rather late in the legislative process, I believe that it may nonetheless be of use to you.

The enclosed memorandum is based upon an analysis of the bill as it existed before last week's mark-up. I understand that some changes were made to the bill at mark-up that may have an important impact upon this Commission. If so, I will forward to you, as soon as it is available, a further analysis of the impact of those changes. In addition, I would be happy to provide you with any other information you may require.

My basic concern with S.1080 is that it would be counterproductive if applied to agencies like this Commission. The intent of the bill is to relieve regulatory burden on the public by requiring agencies to comply with more comprehensive procedures to justify the agencies' imposition of burdens. For purposes of analyzing whether S.1080 would effect the intended result, it is useful to distinguish between two types of agencies: those whose actions impose restrictions on the public, and those whose actions relieve restrictions. The first type includes agencies whose actions affect industry or other members of the public by prohibiting conduct that would otherwise be permissible. For these agencies, S.1080, with its provisions for assuring more strict screening of agency actions, may well be appropriate.

The second type of agency, like this Commission, include those whose inaction is burdensome to the public; that is, whose actions permit conduct that would otherwise be prohibited. To illustrate with specific reference to the responsibilities of this Commission, certificates for transportation of certain natural gas and licenses for the construction of hydroelectric projects are not obtainable until the Commission affirmatively grants them. To the extent S.1080 would delay Commission rulemakings related to these and similar matters, it would burden the industry by increasing the time and resources necessary to obtain government approval to conduct business and, thereby, would achieve a result contrary to the intent of the bill. In this connection, although we understand that the intent of the bill is to exempt ratemaking from its scope, we believe some rulemakings related to the rate-setting process would still be covered by the bill and that similar problems would obtain in connection with such rulemakings.

Another way in which S.1080, as applied to this Commission, would produce a result opposite to that intended is the way in which it would affect the Commission's programs to simplify the procedures to obtain Commission approval. The Commission has made a significant effort in the past several years, which I fully support and am committed to advancing, to reduce its backlog of decisions by establishing expedited proceedings for routine matters. The Commission is also reviewing its information-gathering burdens on the regulated industries in order to reduce the amount of information required to be submitted to the Commission to that which is absolutely necessary to Commission decisions. Since October of 1979, the amount of information required of industry has been revised to the extent that the burden on the industry of supplying that information has been reduced by over 280 person-years per year with a resulting savings of about $8.5 million per year. Both of these programs are being implemented by generic rulemakings and would therefore be affected detrimentally by the enactment of S.1080.

As the enclosed memorandum indicates, S.1080 could significantly increase the cost to the Commission in dollars and time required to implement these and similar programs. The bill may add upwards of $70 million over a ten-year period to the Commission's administrative costs to initiate rulemakings and delay rulemaking proceedings by a minimum of three to six months. In addition, there could be a serious twofold impact upon this Commission's administration of its non-rulemaking proceedings. First, to the extent that Commission resources are expended on more complex and extensive generic rulemaking proceedings, they will not be available for the cases. Second, to the extent the new procedures of S.1080 delay generic rulemaking efforts to ease the case backlog, administrative delay on this important aspect of the Commission's work will continue. In this regard, I need only cite to this Commission's continuing efforts to deal with an evergrowing avalanche of hydro-electric project licensing applications.

Apart from the Commission's administrative costs, there will also be costs to industry under S.1080. However they are measured, be they the costs of gathering and supplying the Commission with the information required under the new rulemaking procedures, the costs of participating in those new procedures, or the costs that attend regulatory delay, these costs could be expected to be a considerable multiple of the Commission's administrative costs. This is because the stakes to industry are so high and the affected entities -- particularly in a rulemaking affecting end users or other consumers active in the regulatory process, for example -- are so numerous.

These increased regulatory costs, both administrative and industrial, would result in few discernable benefits to the public. Accordingly, it is my belief that the application of S.1080 to this Commission would aggravate the very problems the bill is intended to cure. Several provisions of S.1080 need to be modified to prevent such a result when applied to an agency, like this Commission, whose actions are prerequisite to the functioning of the regulated industries.

Thank you for the opportunity to share my thoughts on this matter with you.

Sincerely,

C. M. Butler III
Chairman

Enclosure (1)

Copies to:

Senator Paul Laxalt
Congressman John D. Dingell
Congressman James T. Broyhill
Congressman George E. Danielson
Congressman Carlos J. Moorhead
Congressman Trent Lott
Congressman Richard Bruce Cheney
Congressman Thomas G. Loeffler

Mr. David A. Stockman
Mr. Martin Anderson
Mr. Murray L. Weidenbaum
Mr. James C. Miller

September 18, 1981

MEMORANDUM TO: The Chairman

FROM : Lawrence Anderson
Deputy Executive Director

John H. Conway
Acting Deputy Assistant General Counsel
Regulatory and Legislative Analysis

SUBJECT : Impact on the Commission of Implementing
Provisions of Senate Proposal S. 1080
(Regulatory Reform Act)

This memorandum is in response to your request of September 11, 1981, for an analysis of the impact the provisions of S. 1080 would have on the Commission if enacted into law. It was prepared with the assistance of the Commission's Office Directors and Assistant General Counsels.

Summary of Important Provisions

The current version of S. 1080 (dated July 17, 1981) would, if enacted, substantially amend the provisions of the Administrative Procedures Act governing agency procedures for notice and comment (informal) rulemaking and the scope of judicial review of these procedures. It would also provide for a continuing cycle of review of certain types of agency rules. An outline of the major provisions of S. 1080 (keyed to the pages of the July 17, 1981 print) is appended.

With respect to rulemaking procedures, the amendments can be summarized as follows (all to be effective for rules noticed for comment after January 1, 1983):

- Amendments to section 553 of Title 5 to require more extensive notice and comment procedures for all agency rulemakings, more extensive provisions for publishing final rules, and more extensive rulemaking files.
- Amendments to Chapter 6 of Title 5 to require special analyses, at both the notice and final issuance stages, for certain types of rules that will have a significant impact on the public ("major" rules).
- Amendments to section 706 of Title 5 to require, for judicial review purposes, "substantial support" for the factual basis of a rule.

In addition, Title 5 would be amended to require, on a 10-year cycle, the review of all major rules in existence on, or issued subsequent to, the date of enactment of the bill. The review, using notice and comment procedures, would be for the purpose of renewing, amending or rescinding a rule. The first step in this review would be to determine which of the Commission's rules were major rules and to schedule the review of those rules. As a practical matter, this must be done within 6 months of the enactment of the bill.

Impact Analysis

In doing this analysis, we have focused on only the major changes to law that would result from enactment of S. 1080. Other changes (for example, a requirement to publish twice a year all rulemakings that will be undertaken during the following 12-month period or the proposal to solve the "race to the courthouse" problem) were not considered. In addition, the impact that the provisions of S. 1080 affecting rules and rulemakings may have must be, to a great extent, conjectural. The amendments to existing law would be complex and would fundamentally change agency rulemaking procedures and their meanings will not be known until glossed by legislative history and subjected to judicial review. Presumptions had to be made about how these provisions will apply and how the Commission will act in the future. In this respect there are two. First, the procedural provisions of S. 1080 respecting agency rulemaking will apply only to the generic rulemakings issued by the Commission under the notice and comment procedures and not to any rulemakings of particular applicability (the case-by-case determinations) made by the Commission. Second, after January 1, 1983, the date on which the procedural and regulatory analysis provisions of S. 1080 for notice and comment rulemaking would take effect, the Commission will propose by notice-for-comment approximately 50 rulemakings per year of which 40 would be considered as "major" rules.

In addition, the analysis is based on an estimate of only the costs that would be incurred by the Commission. No account has been taken of costs that would be incurred by industry in supplying the type of information that may be required under the new procedures of S. 1080, or in participating in those procedures, or in suffering the consequences that may result from delay in administrative action caused by those new procedures. In considering the costs to the Commission, including the administrative delay that will result from implementing S. 1080, we have tended to underestimate those impacts. For example, a regulatory analysis of the type that may be required under S. 1080 for major rules, when conducted by DOE for curtailment regulations, took one year to complete at a cost of about $1 million.

A. Procedures for noticing proposed rules and issuing rules.

The new procedures of S. 1080 are found under sections 3 and 4(a) of the bill. They include a required 60-day comment period, the regulatory analysis provisions for major rules and the use of more formal procedures then are now required to elicit oral comments. These procedures will have an impact on the Commission's processes for both informal rulemaking and case-by-case determinations. The impact on informal rulemaking will be direct and will result in both longer time for completing these proceedings and increased costs. For the Commission's case work, the impact will be indirect and will involve procedural delay.

As a general rule, it now takes about one year for the Commission to complete the average rulemaking. This includes time to design a proposed rule, issue it as a notice of proposed rulemaking, receive and analyze comments, and prepare and issue a final rule.

Of course, some rules can be completed in a shorter time period, but others can take much longer if they are complex.

The procedural innovations of S. 1080 would add at least 3 to 6 months to the average time period for a rule that is determined not to be a "major" rule. This is based upon the requirements for a 60-day comment period (the usual comment period for the Commission is 30 days), the need to do an initial analysis to determine whether the rulemaking would not be a "major" rule, and the drafting requirements to implement the sort of detail to the notice and final rule issuances the bill appears to require. This three-month addition of time is based upon the presumption that the Commisison and its staff has established procedures to implement the new requirements and has gained some experience with those procedures. For rules noticed in the months immediately following the imposition of the new statutory procedures, the time to complete those procedures will be longer, and result in delays of greater than six months.

For those rules that are more complex than the average, or that are determined to be "major" rules, the time to complete a rulemaking could be doubled under the S. 1080 requirements. This would be due to the complexity of regulatory analyses that may be necessary for such rules, the necessity of having direct and cross examinations on oral comments for those rules, and the additional drafting that will attend the noticing and final promulgation of those rules.

In addition to time, the second consideration is cost. Presuming that a reasonable number of rules are determined to be major rules, and thereby subject to the special procedures and regulatory analyses of the proposed bill, the Commission may incur an added expense of about $70 million (in 1983 dollars) over a ten-year period. This added expense would be for additional staff, consulting contracts, support materials and increased Federal Register printing costs.

The provisions of S. 1080 will also affect the Commission's case-specific work load in two ways. First, to the extent staff and other Commission resources will be allocated to implementing the new rulemaking procedures, these resources will be unavailable for other regulatory functions. This will result in some delay in processing cases. Second, to the extent that the implementation of generic rulemakings may be delayed, solutions to generic problems of regulation must continue to be determined through the case-by-case process. Efforts to streamline that process will therefore be delayed and savings in time or administrative expense that may attend that streamlining will also be delayed. These costs have not been quantified, but they may be quite significant.

B. The 10-year review of major rules

A second important provision of S. 1080 is contained in section 4(b) of the bill, the periodic review provision for major rules in effect on or after the enactment date of the bill. Like the new procedures of sections 3 and 4(a), this provision will require additional Commission resources to implement, particularly in the first year after enactment.

The Commission's accumulated regulations now cover over 1000 pages of the current (1980) Code of Federal Regulations. While not all of these regulations would be "major," all must be reviewed. That review, entailing a determination of which are major rules, and the scheduling of review of those that are major over the next 10 years, must be done within 6 month of enactment and submitted to the President. This initial review will require a major Commission effort.

The cost of implementing the regulatory review provisions comes to about $26 million (in 1983 dollars) over a ten-year period. This is based upon the scheduling requirements of the bill, the review cycle, the commitment of staff and resources for rulemaking efforts that must be done under the new rulemaking procedures, and Federal Register printing costs.

To the extent that the regulatory review process requires the commitment of existing Commission resources, there will be delay in other aspects of the Commission's work, including the initiation of new rulemakings, and case proceedings.

C. Review of agency rulemakings

Section 5(b) of S. 1080 would amend the judicial scope of review provisions of section 706 of Title V to require that a reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be "without substantial support in the rulemaking file . . . for the asserted as necessary factual basis . . . ." In addition, that section would also provide that in making determinations or questions of law a court is not to accord any presumptions in favor of or against agency action. These provisions will impact rulemaking proceedings in two ways. First, these provisions will add to the complexity of the Commission's present caseload, already consisting of 317 judicial review petitions as of June 30, 1981, most of which involve rulemakings. Second, these provisions are likely to increase that load by opening for judicial review new types of cases. In either event, there will be an impact on this agency's resources.

S. 1080 also provides for the review, by the President, of certain agency actions respecting major rules. Specifically, the President may designate certain rules as major rules (and that designation may include rules of particular applicability, i.e., case-by-case rulemaking), may establish procedures for agency compliance with the regulatory analyses and regulatory review provisions of the bill, and will review the schedule of regulations for the 10-year review cycle. To the extent that these provisions result in additional administrative processes being imposed on the Commission, resources will have to be committed to implementing, and adhering to, those processes. To the extent that these provisions result in the designation of additional rules as major rules, there will be a greater administrative cost incurred by the Commission.

S 1080
July 17, 1981

I. Important provisions that are specifically directed to agencies

  A. The provisions that are specifically directed for all section 553 rulemakings:

    1. More extensive notice and comment procedures for all agency rulemakings (Section 553 procedures)

      o an analysis as to whether a rulemaking will be a "major" rule (p. 40)

      o a more detailed Notice of Proposed Rulemaking (p. 30-31)

      o specific renotice requirements (p. 31)

      o minimum 60 days' comment period (p. 32)

      o informal public hearings that may include direct and cross examinations (p. 32)

      o narrow definition of rulemakings that can be excepted from these procedures (pp. 28-29)

    2. More extensive provisions on publishing final rules

      o more extensive publication requirements (p. 34)

      o data on which agency can rely must be specified (p. 35)

    3. More extensive clerical requirements as to the "rulemaking file" (pp. 35-36)

  B. Provisions directing agency action as to section 553 rulemakings for "major" rules:

    1. triggered by definition of major rule (pp. 38-39)

    2. the "preliminary" cost benefit analysis for noticing a proposed major rule (pp. 41-42)

3. the "final" cost benefit analysis for issuing the final rule (pp. 42-43)

4. special rules for how analyses are to be conducted and who may make determinations based on those analyes (pp. 43-44)

C. The 10-year review of "major" rules (eff. w/i 6 months)

1. involves all "major" rules (pp. 47-48):

- in existence when statute passed
- and issued after passage of the statute

2. requires particular procedures to schedule that review and to conduct examination of particular rules reviewed. (pp. 47-51)

II. Important provisions that are not directed to agencies

A. The Executive's authority

1. to define what is a "major rule" (pp. 48-49)

2. to enforce the agencies' practice and procedures respecting the issuance and review of major rules through agency oversight (p. 46)

3. specific authority respecting the selection and scheduling of rules for the 10-year review cycle (pp. 47, 50-51)

B. Judicial review provisions

1. of an agency's compliance with notice and comment rulemaking procedures (p. 33)

2. of the analyses conducted for "major" rules (p. 45)

3. of actions taken to select a rule as a "major" rule (pp. 44-45)

4. of agency actions in issuing a rule as final agency action (the Bumpers amendment) (pp. 54-55)

SEP 9 1981

1700 G Street, N.W.
Washington, D.C. 20552
Federal Home Loan Bank System
Federal Home Loan Mortgage Corporation
Federal Savings and Loan Insurance Corporation

Federal Home Loan Bank Board

RICHARD T. PRATT
CHAIRMAN

SEP 9 1981

Honorable William V. Roth
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This is in response to your request for our comments on the portions of S. 1080 relating to executive branch oversight of certain agency rulemaking functions. Because other portions of the bill also raise significant questions of public policy for the Bank Board and other independent agencies, we have commented on these portions as well.

S. 1080, as reported by the Senate Judiciary Committee July 17, contains five major revisions to the Administrative Procedures Act (5 U.S.C. §§551 et seq.) ("APA") and related law. Section 2 would amend Section 551 of the APA to include a definition of "emergency rules" which could be promulgated without prior compliance with the rather cumbersome notice and comment procedures of the amended Section 553. Section 3 would amend Section 553 of the APA to alter "informal" rulemaking procedures. Section 4 would require preliminary and final regulatory analyses for certain "major rules" of significant economic impact, establish executive branch oversight over such agency analyses, and require all agencies to undertake a review of existing and new "major" rules on a ten-year review schedule. Section 5 would amend Section 706 of the APA to provide new standards for judicial review of agency action, including rulemaking, while Section 6 would amend the venue provisions of Title 28 of the United States Code pertaining to APA appeals.

As a matter of principle, the Bank Board fully supports the goal of regulatory reform, including streamlining the regulatory process and minimizing unnecessary regulatory restrictions whose costs outweigh their potential benefits. However, the Bank Board must evaluate any proposal for regulatory reform within the context of its own unique statutory responsibilities. Since passage of the Depository Institutions Deregulation and Monetary Control Act of 1980, Public Law 96-221, 94 Stat. 132, the Bank Board has followed its Congressional mandate to implement the new powers granted Federal savings and loans and to deregulate the savings and loan industry. As a result, the Board currently is reviewing all regulations to remove unnecessary restrictions and leave business decisions with an institution's management whenever possible. Because of the economic and competitive environment facing the savings and loan industry, it is often necessary for the Board to act as quickly as possible in accordance with applicable law in changing the regulatory structure.

It is our belief that Congress should address all aspects of the administrative process and any proposal for change from a single perspective: whether the mechanisms provide for fair and effective implementation of the policies adopted by the elected representatives of the people. Viewing S. 1080 from this perspective, we cannot support the bill because there are a number of provisions which we believe are unnecessarily duplicative of existing law designed to achieve regulatory reform, and of doubtful usefulness in streamlining the regulatory process. Moreover, certain provisions may in fact hamper deregulation by inviting confusion, delay and litigation.

Rulemaking Amendments

The changes that would be made by S. 1080 to informal rulemaking procedures generally tend to complicate agency rulemaking and constrain flexibility essential if agencies are to avoid unnecessary delay in the rulemaking process, especially for rules designed to lift restrictions or generally deregulate an area.

A. Notice and Comment Procedures

Section 3 of the proposal would amend section 553 to require: (A) mandatory opportunity for oral comment in all rulemaking proceedings, including mandatory direct and cross examination "when other procedures are determined to be inadequate for the resolution of material issues of fact"; (B) description in the notice of proposed rulemaking of data, studies and other similar information developed by the agency that pertains directly to the rulemaking and that the agency has considered in connection with rulemaking; (C) a mandatory 60 day initial comment period; and (D) a requirement to permit comment on any factual or methodological material of central relevance to the proceeding by "interested persons." If such opportunity for comment is not provided an agency may not "substantially rely" on any such material not identified in the notice of proposed rulemaking. In addition, the new Section 553(f)(1)(B) requires a copy or identification of all studies and documentary material that the agency considered in connection with the rulemaking or substantially relied on in promulgating the final rule to be kept in a public file.

Although the proposed changes to rulemaking and agency hearing procedures in S. 1080 could increase public participation, the amendments are likely to render agency decision-making prohibitively expensive and unduly time-consuming. First, to require an opportunity for oral presentation of views in all informal rulemaking proceedings would result in delay and unduly restrict an agency's attempts to carry out statutory directives even when Congressional intent is clear. In our opinion, the cost of providing an opportunity for oral argument will rarely if ever provide enough significant new insight or other benefits to justify the inevitable delay and expense involved.

For very similar reasons, the Bank Board is also opposed to the cross-examination requirement presently incorporated in the bill. Because Section 553(d)(3), as proposed to be amended, contemplates that an agency's failure to provide cross-examination is subject to judicial review, this provision has the potential of converting informal rulemaking into a trial-type proceeding -- a fundamental change in agency procedure which would result in still more delay of agency proceedings. Moreover, the very fact that judicial review is available on the cross-examination issue is likely to provoke litigation and time consuming debate over when the statute requires cross-examination. In order to avoid judicial reversal on procedural grounds, agencies are likely to err on the side of cross-examination, even when it serves no useful purpose.

The various requirements in the new Section 553(c), (e) and (f), to identify or summarize the facts on which the rulemaking is based and the studies and documentary materials on which the agency substantially relied, raise two problems. First, subsection 553(f)(1)(2) would provide that the public file incorporating such data may exclude material otherwise protected from disclosure under section 552 of the APA. However, an agency which takes advantage of the exclusion may not substantially rely on any of the excluded material in formulating a rule unless it makes the substance of the material available in a way protecting the confidentiality of the data to the maximum extent possible. In the case of the Bank Board, such a requirement could force the Bank Board to disclose sensitive financial data which would otherwise be protected because of its potential adverse affect on public confidence in the financial system. Neither the Bank Board nor other financial supervisors should be forced to take such risks in the absence of compelling evidence for the need for such an amendment to present law.

Another problem with the various provisions relating to disclosure of data relied on by the agency in rulemaking is that the language of the proposal may be interpreted to require that every rule be based on specific "facts" developed in the proceeding rather than on the legal or policy judgments of the agency. Such a construction would reduce or eliminate agencies' present flexibility to base rules on considerations of law or policy, or a mixture of law, fact, and policy. We suggest that, if the Committee retains this amendment, the language of proposed Section 553(e)(1)(D) should be revised to provide that agencies accompany final rules with a statement of factual conclusions upon which the rule is based only in appropriate cases, at the agencies' discretion.

The Bank Board is also strongly opposed to proposed subsection 553(e)(2), prohibiting an agency from substantially relying on any factual material not identified in the proposed rulemaking notice unless there has been an opportunity for public comment in cases where the material is "of central relevance to the proceeding." This provision in effect requires that agencies continuously extend the comment period for proposed rulemaking, and could cause extreme delay. Another requirement which threatens to substantially delay agency rulemaking without comparable benefits is the new requirement that agencies give interested persons the right to petition for amendment, issuance, or repeal of rules, or advice or interpretation regarding rule applications, and that it must respond promptly and in writing to each such petition, with a statement of reasons. It is quite conceivable that this directive could quickly force the Bank Board and other agencies to reorder their priorities from the principal regulatory task imposed by Congress to providing responses to a flood of nonmeritorious petitions.

In view of the additional complexity and delay inherent in the amendments to Section 553 outlined above, we must also oppose the changes to Sections 551 and 553 which greatly restrict agency discretion to promulgate informal rules by waiving the complex notice and comment requirements in certain cases. Currently, an agency can avoid notice and comment procedures altogether for interpretive rules and general statements of policy and may also waive the notice of public procedures when the agency finds they are "impractical, unnecessary or contrary to public interest". Under S. 1080, an agency would be compelled to provide notice and comment procedure for any statements of general policy or interpretive rule which had "general applicability and substantially alters or creates rights or obligations of persons outside the agency." Additionally the agency could avoid the routine 60-day comment period only by finding that a particular rule, if delayed, would seriously injure an important public interest, a person or class of persons, and delay would not serve any important public interest. Proposed Section 551(a)(15). The loss of flexibility to waive routine procedures is likely to severely hamper Bank Board rulemaking designed to effect deregulation or lift existing statutory or regulatory requirements, which could not be classified as seriously injuring an important public interest if delayed.

B. Regulatory Analysis of Major Rules

We are also deeply troubled by the provision in S. 1080 which would require preliminary and final regulatory analyses of "major" rules, and presidential oversight of agency compliance with these requirements. Fundamentally and most importantly, we question the need for these measures in view of existing laws which impose substantially similar requirements and Bank Board policy designed to achieve the same goals. The Bank Board procedures in this regard are presently governed by the Regulatory Flexibility Act (5 U.S.C. §§601 et seq.), the Paperwork Reduction Act (44 U.S.C. §§3501 et seq.), Title VIII of the Depository Institutions Deregulation and Monetary Control of 1980, and Bank Board Resolution 80-584.

Pursuant to the Regulatory Flexibility Act, the Bank Board is already required to prepare initial and final regulatory analyses for all rules now subject to Section 553 of the APA. These analyses must evaluate the need and objective for rules affecting "small entities," consider alternatives to minimize the impact on small entities and explain why a particular alternative was adopted, and consider the issues raised in public comments on the rule. The Paperwork Reduction Act requires all agencies to undertake a form of cost-benefit analysis before they are permitted to formulate new rules to collect information.

The Bank Board is also subject, along with the other Federal financial institutions supervisory agencies, to statutes designed to improve the administrative process with particular regard to financial institution agencies. Under the Financial Regulation Simplification Act of 1980 (Title VIII of the Depository Institutions Deregulation and Monetary Control Act of 1980), all of the federal financial supervisory agencies are required to reduce the regulatory burden on financial institutions by carefully establishing the purpose of each regulation to be issued, by considering meaningful alternatives to proposals, by eliminating conflict among rules, and by reviewing existing regulations, among other things. The same agencies, through their membership in the Federal Financial Institutions Examination Council ("FFIEC"), are currently improving the regulatory process through cooperation and coordination in the administration of regulatory and supervisory requirements impacting the affairs of financial institutions under their respective jurisdictions. This is primarily accomplished through the statutory requirement to bring about uniform examination principals and a degree of commonality in reporting requirements imposed on all Federal financial institutions. The special attention given by Congress to the Federal financial institutions and their supervisory agencies under this statute suggests that the regulatory reform process, as it affects such institutions, is likely to continue with or without enactment of S. 1080.

Finally, the Bank Board has demonstrated its commitment to regulatory reform by adopting Board Resolution 80-584. Among other things, the resolution provides for the early involvement of the public in the rulemaking process, consideration of alternative proposals, analysis of a proposal's effect upon competition, and an in-depth regulatory review for proposals which may have a major economic consequence and which constitute a major departure from previous policy or a new area of regulation.

Apart from the problem of redundancy of the regulatory analysis requirements of S. 1080, we are also concerned that the language as presently drafted is so vague that time consuming and fruitless delay in agency procedures seems inevitable. Thus, the definition of "major rule," a classification which triggers the requirement of regulatory analyses, is so broad that it may hinder an agency's focus on the very important rules. Accordingly, there is a danger that the quality of the regulatory analyses will be diluted.

In particular, Section 621(3)(B) now classifies as major rules those which are "likely to result" in either a "substantial increase in cost or prices for wage earners, consumers, individual industries or Federal, State or local government agencies, or geographic regions;" (2) "significant adverse effects" on competition, productivity, innovation, and certain competitive factors, or (3) "other effects that warrant subjecting the rule to a regulatory analysis". All three phrases are so vague that they are likely to create an incentive for parties affected by a rule, including financial entities, to argue that a particular rule should be classified as major. Because officials outside the agency would be given the power to overrule an agency's determination of what constitutes a major rule under these definitions, it is also likely that interested parties will lobby those individuals to attempt to get them to pressure the agency to do an analysis, thus creating more delay.

The problems inherent in the regulatory analysis requirements of S. 1080 are especially burdensome to the Bank Board. Our limited resources are already being severely tested by the need to alleviate the current severe earnings problems in the thrift industry. The Bank Board can ill afford the sort of reordering of agency priorities which S. 1080 portends, from aiding a severely troubled industry by direct financial assistance and deregulation to performing defensive regulatory analyses which are of doubtful benefit in view of existing Bank Board policies and other laws requiring such analyses.

In view of these problems, we strongly urge Congress to eliminate altogether the S. 1080 requirement for regulatory analyses of major rules. At the least, the definition of a "major rule" should be limited to the definition which states that a major rule is one likely to have an annual effect on the economy of $100,000,000 or more in direct or indirect enforcement and compliance costs. While it may be difficult to quantify the cost of enforcement and compliance, we believe that a numerical test carries far less potential for endless debate than the nebulous concepts of "substantial increase" in costs and "significant adverse effects" on competition and other factors. Should you wish to avoid the necessary inaccuracy of such predictions, we suggest that the definition of "major rule" be rewritten to give agencies more flexibility. In order to accomplish such a result, we suggest the following definition for "major rule":

> "A rule or series of closely related rules which the agency determines is likely to have a major economic consequence and is either a major departure from agency policy or a new area of regulation."

In addition to our concern that the vagueness of the definition of a "major rule" is likely to lead to unnecessary delay and complexity, we believe that the present exceptions from the requirement for regulatory analyses are too narrow. As the bill is currently written, exceptions from classification as a "major rule" are provided only for the rules of particular applicability approving or prescribing items such as rates or wages for the future, and for rules authorizing the marketing of certain products or services that would otherwise be prohibited by statute. By failing to provide an exception for rules which may have a major economic impact but whose purpose is to relax or lift a statutory or regulatory burden on doing business, S. 1080 would lead to substantial delays in efforts to deregulate. If Congress determines to retain the provision for regulatory analyses in S. 1080, we believe that the exceptions to the definition should be amended to take into account a broader range of deregulation actions.

Regulatory Review/Regulatory Agenda

Under sections 631 and 632 of the proposal, agencies are required to review over a ten-year period all existing and new major rules. Again, we question the necessity of this provision for regulatory review in light of existing law and Bank Board policy. Under the Regulatory Flexibility Act, the Bank Board is already required to publish a semi-annual "regulatory flexibility agenda," describing the nature and object, and legal basis for all rules to be proposed which have a significant economic impact on a substantial number of small entities. Additionally, the Bank Board must undertake a periodic review of all rules with such a significant impact on small entities within ten years from July 1, 1981, or in the case of new rules, within ten years from the publication date. It seems quite likely that in many cases, a rule subject to the review requirements of the Regulatory Flexibility Act will also fall within the definition of "major rule" under S. 1080. Finally, the Bank Board is already committed to a less formal periodic review of all rules pursuant to Bank Board Resolution 80-584. Under this resolution, the Board is required to review rules considering such factors as public reaction to the rule, the burden imposed by the rule, the need to eliminate duplication, and changes in economic conditions effecting the rule.

Presidential Oversight

Pursuant to proposed Section 624, the President will be given power to establish procedures for agency compliance with the new requirements for regulatory analyses of major rules and periodic review of major rules. Pursuant to Section 622(b), the President or his designee will also be given the power to overrule an agency's determination that a rule is not "major," and may override the agency upon either the "$100,000,000" criterion or the vaguer tests of "substantial increase" in cost, "significant adverse effects" on competition, and the catch-all provision of proposed Section 621(3)(b)(iii).

Our objections to the provisions for Presidential oversight are threefold. First, as noted earlier, the opportunity for Presidential review will lead to delays as interested parties petition the Executive to overturn agency findings that a rule is not "major". Second, S. 1080 already contains a definition of a "major rule" which may require a large number of regulatory analyses. Within that definition, each agency should be able to correctly determine whether a rule fits within the major rule category. The agency has the technical expertise, knowledge of the individual facts, and the resources to make an accurate, good faith assessment of the impact of each rule. Third, the Bank Board, as well as the other independent agencies, have been given a mandate to make technical expert decisions on the basis of merit, not political pressure. For example, Presidential control of regulatory analyses could be used to prevent legitimate agency action in carrying out specific legislative mandates from Congress. This provision could seriously compromise the independence of the Bank Board and the other independent agencies. Finally, it is important to recognize that the Bank Board is already accountable to Congress through its power to conduct oversight hearings, to amend underlying statutory power, and through appropriation hearings. The Bank Board's members, as well as those of other independent agencies, are appointed by the President and the Bank Board must justify its actions in court when challenged.

To avoid these problems, we believe that, at a minimum, S. 1080's oversight provisions should be amended to provide for oversight by Congress or the GAO as preferable alternative safeguards. In particular, we believe that a provision for legislative veto by Congress would be a more effective counterweight to agency abuse of discretion to determine whether or not a rule is "major," and would avoid the delay and uncertainty likely to be provoked by the availability of an appeal to both the President and the judiciary.

Judicial Review

S. 1080 would make several important changes in 5 U.S.C. §706, which governs the scope of judicial review of administrative action under the APA. First, Section 706(a) would be amended to add the word "independently" in the first sentence. Second, Section 706 would be amended to establish a new basis upon which agency rules promulgated pursuant to 5 U.S.C. §553 may be overturned. Briefly, it would authorize a reviewing court to hold unlawful and set aside agency action, findings and conclusions of law found to be "without substantial support in the rulemaking file, viewed as a whole, for the asserted or necessary factual basis . . . of a rule adopted in a proceeding subject to section 553 of this title [5 U.S.C. §553]." The "substantial support" language used in this section is similar to the substantial evidence test which is used in adjudicatory proceedings under the APA. A final change would amend Section 706 to require that agency action "be within the scope of the agency jurisdiction or authority on the basis of the language of the statute or, in the event of ambiguity, on the basis of other evidence of ascertainable legislative intent . . . " The amended language would also state that "a court shall require that action by the agency is within the scope of agency jurisdiction or authority on the basis of the language of the statute or, in the event of ambiguity, other evidence of ascertainable legislative intent. In making determinations on other questions of law, the court shall not accord any presumption in favor of or against agency action." All three changes also appeared in legislation introduced earlier this year by Senator Bumpers (S. 67).

Broadly construed, both the change to the first sentence of Section 706(a) and the addition of new subsection 706(c) could be construed to remove the traditional presumption in favor of agency expertise in such areas as the interpretation of their own statutes and regulations. Therefore, our comments will address both these provisions as a single issue. First, new subsection 706(c) is unacceptable because it arguably imposes a presumption against agency action with respect to jurisdiction. Although the first sentence of subsection 706(c) does not expressly impose the presumption against agency action with respect to jurisdictional authority, this presumption may be inferred from the second sentence of the subsection. That sentence provides that in making determinations "on other questions of law" (emphasis added) under Section 706, a reviewing court shall not accord any presumption in favor of or against agency action. The second sentence clearly implies that some presumption is to affect certain questions of law, and the juxtaposition of the second sentence with the first sentence of section 706(c) implies that these "certain questions" of law must refer to questions of statutory authority. Moreover, to the extent that the first sentence in Section 706(c) sets forth a presumption, it is clear from the language of the sentence that the presumption would be against the agency. This presumption against agency jurisdiction is further supported by Senator Bumpers' statement that pursuant to identical language in S. 67, "the agency and the appellant stand on equal footing before the law without bias, preference, or deference to either and without any presumption in support of or against agency action except as to questions of jurisdiction, where the first part of subsection (c) imposes the burden upon the agency." 127 Cong. Rec. S113 (daily ed. January 6, 1981). (emphasis added)

We believe this apparent presumption against agency jurisdiction is directly contrary to the purpose of other major provisions of S. 1080, to make agencies more accountable for their actions. The presumption against jurisdiction would thwart this goal by shifting much of the responsibility to an unelected and unreviewable judiciary. Additionally, the presumption thwarts the very purpose of establishing independent agencies such as the Bank Board, which were created to provide a body of expertise in certain subject matters. Such a body of expertise cannot be fully utilized when there is a presumption against an assertion of statutory authority.

Not only does S. 1080 place an undue burden on agency assertions of statutory, it provides an agency with few efforts for sustaining that burden. Thus, the bill directs reviewing courts to require that action by the agency is within the scope of agency jurisdiction or authority "on the basis of the language of the statute or, in the event of ambiguity, other evidence of ascertainable legislative intent." We believe that, if S. 1080 is enacted, this standard should be modified to incorporate a reference to statutory goals or purposes and the nature of the asserted agency action. Express reference to statutory goals and purposes is desirable because, in interpreting broad statutory language, agencies must often act by reference to such goals and purposes rather than by reference to any explicit language or even legislative history. Second, as Senator Bumpers himself has stated in explaining identical changes to 706(c) made by S. 67, reviewing courts making determinations of statutory jurisdiction should be influenced not only by the statute's legislative history but also by "the nature of the asserted power". Thus, for example, Senator Bumpers noted that if the asserted authority relates to an "interstitial or minor matter," the reviewing court would be justified in concluding that although Congress had not directly addressed the issue, the matter is of such a character that "sensible administration necessarily requires exercise of such an implementing authority." Id. We believe this language is too significant to be left merely to legislative history, and accordingly, recommend that similar language be incorporated in the first sentence of section 706(c).

There are also a number of serious problems with the "no-presumption" language in the second sentence of Section 706(c) with respect to "other questions of law". First, the reference to "other questions of law" is extremely vague. Although it apparently refers to questions other than those involving the scope of agency jurisdiction or authority, the distinction between questions of law and questions of statutory jurisdiction is dubious. Thus, the supposed distinction between questions of jurisdiction and law is likely to be so confusing and arbitrary that it will result in little certainty of application. The net result of this uncertainty is likely to be lengthy court battles that will severely tax the Bank Board's limited resources.

Second, this standard is unacceptable because it ignores the fact that rulemaking is generally a combination of fact finding, policy considerations and statutory interpretation. As presently drafted, this standard could require an agency to undertake the difficult task of separating specific facts from policy considerations or various elements of statutory interpretation or both and then establish a tangible evidentiary basis for each of those facts in order to avoid invalidation of the rule in court. Many Bank Board rulemakings involve statutory interpretation and policy considerations, as opposed to legislative findings of fact.

As in the case of the change regarding judicial review of agency statutory jurisdiction and authority, the ultimate result of the "no presumption" language is to further encourage an unelected, unaccountable judiciary to substitute their judgment for that of the agencies when reviewing rules and other agency actions. The value of agency expertise, the fundamental element in administrative rulemaking practice, will be lessened by placing such extraordinary burdens upon the courts, and by requiring judges to exercise and expertise which they have no practical means of acquiring.

Accordingly, we believe that this approach will be less effective in reducing government regulation and increasing accountability than careful Congressional review and revision of existing laws and regulations, including the exercise of a legislative veto in certain circumstances.

The final change made by S. 1080 to Section 706 is the addition of a basis for invalidating agency action without "substantial support in the rulemaking file . . . for the asserted or necessary factual basis of a rule" adopted in an informal rulemaking proceedings. This amendment is likely to result in longer, more formalistic proceedings since agencies may be over cautious in attempting to guard against possible adverse rulings by courts that the record was insufficient or improperly compiled. Such delays are in turn likely to thwart attempts at deregulation as well as overregulation. Ideally, this provision should simply be deleted. However, if it is retained, we recommend that the word "the" should be replaced by the word "an" since there is likely to be more than one "asserted or necessary factual basis". Additionally, it is unclear why an agency action should be judicially voidable if merely an asserted factual basis, as opposed to a "necessary" factual basis, is found to be incorrect. That is, the falsity of an asserted basis is irrelevant in light of the truth of all "necessary" factual bases.

A third problem with Section 706(c) which we believe justifies its elimination is the ambiguity of the term "substantial support". Moreover, the fact that this language parallels the "substantial evidence" test for review of factual findings in formal rulemakings highlights the danger that because of ambiguity, reviewing courts will engage in a similarly stringent review under Section 553. In turn, this will decrease the efficiency of the informal rulemaking process and add undue costs to agency action. In addition, since the purpose of this language is to ensure that policy decisions are reasonably grounded in correct factual assumptions, the language is superfluous in light of Section 706(a)(2)(A). Finally, we believe that the current arbitrary and capricious test for review of such factual findings is both practical and sufficient, since the factual basis for a rule often involves the need to resort to agency expertise. If Section 706(2)(F) is not deleted altogether, we recommend in the alternative that the language should be amended so that only "rational support" or "reasonable support" is needed to sustain the agencies determination.

In conclusion, we are extremely skeptical that the cumulative additional requirements imposed by S. 1080 for preliminary and final regulatory analyses, Presidential oversight of agency rule-making and review of all new and existing major rules will improve the regulatory process. Because of the vagueness of many important statutory terms, it is far more likely that the bill will create a regulatory overload which could severely hamper the regulatory process, as well as attempts by agencies such as the Bank Board, to deregulate an industry as much as possible within present statutory limits. Further, S. 1080's changes to present APA standards for judicial review of rulemaking are likely to change the entire field of administrative law. The amendments will touch all administrative agencies and will necessitate dramatic legislative changes in virtually all statutes delegating authority to the agencies. Before taking such a drastic approach to the present administrative scheme, we believe Congress should carefully and thoroughly explore alternative means to correct perceived problems in a few particular regulatory bodies. Otherwise, it is very likely that the resulting burden on the judiciary and the administrative agencies will impede legitimate attempts to protect the public interest and will destroy the notion of a partnership between the courts and the agencies.

Finally, we wish to note that, in our view, there is no need for complicating and lengthening the Bank Board's regulatory process. The Bank Board is a fairly small agency with specific regulatory mandates and issues a relatively small number of new regulations or amendments to existing regulations in a year, absent specific statutory changes necessitating new regulations. Because of the specificity of our statutes, most of our regulatory activity is generated by statutory changes. Much of the remainder involves amendments to existing regulations to address some difficulty caused by changing economic conditions or which our examination staff has uncovered. We are already subject to significant Congressional oversight during our annual budget hearings and during periodic oversight hearings conducted by the banking Committees. When neither of these committees has felt that we were embarking on a path with which they disagreed, they have not hesitated to so inform us. Congress created independent regulatory agencies such as the Bank Board for very specific purposes. When a statute is enacted which authorizes us to develop regulations on a certain subject it is because Congress has recognized it does not have the time, staff, or expertise needed to develop these regulations. Our goal is to make the Bank Board regulatory function efficient and responsive. This bill would unnecessarily delay and complicate this process. Accordingly, we strongly urge you not to adopt S. 1080.

I hope these comments will aid your Committee in evaluating the merits of this proposal. Please note that, in accordance with 12 U.S.C. §250, this letter has not been reviewed outside the Federal Home Loan Bank Board, and does not necessarily reflect the views of the President.

Sincerely

Richard T. Pratt
Chairman

Federal Maritime Commission
Washington, D.C. 20573

Office of the Chairman

SEP 11 1981

Honorable William V. Roth, Jr.
Chairman, Committee on Governmental Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This is in response to your request for the views of the Federal Maritime Commission (FMC) with respect to section 624 of S. 1080 which provides that the President shall have "authority to establish procedures for agency compliance" with the bill's requirements for major rulemakings, including the preparation of initial and final regulatory analyses. The FMC is an independent agency charged by Congress with responsibility for administering the Shipping Act, 1916 and related statutes (see Reorg. Plan No. 7 of 1961, 75 Stat. 840). As such, the Commission has three major types of functions: quasi-legislative, quasi-judicial and enforcement. In 1961, the maritime regulatory and promotional missions were separated and placed in two separate agencies, the FMC and the Maritime Administration. The FMC's status as an independent agency was viewed by Congress as a necessary prerequisite for its performance of its regulatory functions in a fair and impartial manner, insulated from political considerations.*/

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* As recently as 1972 when Congress established the Consumer Product Safety Commission, the House Committee explained its rationale for requiring an agency's independence:

> "This decision reflects the committee's belief that an independent agency can better carry out the legislative and judicial functions contained in this bill with the cold neutrality that the public has a right to expect of regulatory agencies formed for its protection. Independent status, and bipartisan commissioners with staggered and fixed terms, will tend to provide greater insulation from political and economic pressures than is possible or likely in a cabinet-level department. The Commission's decision under this legislation will necessarily involve a careful meld of safety and economic considerations. This delicate balance, the committee believes, should be struck in a setting as far removed as possible from partisan influence." H.R. Rep. No. 92-1153, 92nd Cong., 2d Sess. 24-25 (197[illegible]).

We support the efforts of the President to control the promulgation of unnecessary rules and regulations by executive agencies and departments through oversight of their compliance with A.P.A. procedures. We oppose, however, application of executive branch control to independent agencies since it would represent a diminution of the agencies' independent status. We view section 624's applicability to the independent agencies as inconsistent with the intent of Congress to separate these agencies from the control of the executive. The Commission, as an independent agency, is responsible to Congress, not the President, for our activities in carrying out our statutory mandate. The FMC therefore opposes the enactment of section 624 in its present form, and recommends that the section be amended to exclude the independent agencies from its scope.

While the authority granted to the executive by section 624 is couched in terms of procedural oversight, there is a possibility that the oversight of procedural concerns will extend to the arena of substantive issues before an independent agency in a major rulemaking. This presents a potential conflict between section 624 of the bill and section 557 of the Administrative Procedure Act (5 U.S.C. 557), which established a strict prohibition against ex parte communications with agency decision-making personnel on matters before the agency. If the procedural oversight authority pursuant to section 624 is made applicable to independent agencies, communications between the executive branch and the independent agencies with respect to all major rules will become commonplace and so will the opportunity for input of a more substantive nature. Such communications could be influential and would not be answered by public comment. We do not mean to imply that the executive branch would routinely overstep its authority under section 624, but we do believe that it is wiser to avoid creating this environment when there is no basis for believing that independent agencies would not fully comply with the proposed administrative procedures without executive oversight.

As recently as last September, Congress imposed additional procedural requirements for agency rulemaking by enacting the Regulatory Flexibility Act (P.L. 96-354, Sept. 19, 1980, 94 Stat. 1165). That Act requires an agency to prepare initial and final regulatory analyses taking into account the effect of a proposed rule on small businesses, non-profit entities and small governmental bodies. Congress did not think it necessary then to require executive oversight of how the independent agencies complied with those procedural requirements which were applicable to all proposed agency rules and, through a retroactive review, all existing rules. The need for executive oversight of independent agencies under S. 1080 where similar requirements are imposed with respect to a limited number of rules, i.e. major rules, is not apparent.

The Commission has been successful in implementing a considerable number of reform measures through a reorganization of internal offices and bureaus and a streamlining of agency procedures. We have also achieved a reduction in the paperwork and regulatory burden on industry through the use of our exemption authority (section 35 of the Shipping Act, 1916, 46 U.S.C. 833a). These measures were initiated and completed without the oversight of the executive branch.

Finally, the Commission is concerned that section 624 may provide the occasion for delay in the rulemaking process. In our view, it imposes an unnecessary, additional layer of review in a procedure that is already viewed in some quarters as protracted and unresponsive.

In sum, while it is certainly appropriate for the President to oversee the rulemaking activities of executive departments and agencies, it is not appropriate to apply that same authority to the independent agencies. Section 624's applicability to independent agencies is inconsistent with the independent status of these agencies and with the Administrative Procedure Act. It will also be a source of unnecessary delay. Absent a showing that the independent agencies are incapable of meeting the proposed requirements under the A.P.A. without executive oversight, we recommend that the independent agencies be excluded from the applicability of section 624.

The Commission appreciates the opportunity to comment on this important legislation. Should you have any questions concerning our comments or if we may be of assistance with respect to any other matter, please do not hesitate to contact me.

Sincerely,

Alan Green, Jr.
Chairman

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

OFFICE OF THE CHAIRMAN

August 31, 1981

The Honorable William V. Roth, Jr.
United States Senate
Committee on Government Affairs
Washington, D.C. 20510

Dear Senator Roth:

I have received your letter dated July 30, 1981 regarding section 624 of S. 1080, which relates to Executive Branch oversight of agency compliance with the bill's requirements for major rulemaking.

The Federal Mine Safety and Health Review Commission is, of course, one of the independent agencies to which you refer in your letter and to which section 624 would appear to apply. However, the Commission does not promulgate rules and regulations which could be considered "major" as that term is used in section 621(3) of S. 1080. Rather, the responsibility for promulgating "major" rules under the Federal Mine Safety and Health Act of 1977 is by statute placed with the Mine Safety and Health Administration of the Department of Labor. The rulemaking authority of the Commission is limited--also by statute--to procedural areas which not only do not fit within the definition of "major" but also may be excluded from coverage entirely by section 2(b)(1) of the bill. Accordingly, I do not believe that S. 1080, and particularly the Executive oversight provision in section 624, will have much of an impact on this agency.

If I may be of any further assistance, please do not hesitate to call on me.

Sincerely,

Richard V. Backley
Chairman

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D. C. 20551

PAUL A. VOLCKER
CHAIRMAN

September 10, 1981

The Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D. C. 20510

Dear Chairman Roth:

I am pleased to submit views regarding the executive oversight provisions in S. 1080, the "Regulatory Reform Act," as you requested in your letter dated July 30, 1981.

The executive oversight provisions of S. 1080 (new section 624 of Title 5 of the United States Code) would authorize the President, or an officer to whom he delegated this authority, to monitor, review, and ensure agency implementation of the "major rule" procedural requirements of S. 1080 (new sections 621 and 622 of Title 5) and to report annually to Congress on agencies' compliance with these requirements. The President's exercise or nonexercise of this oversight authority would not be judicially reviewable.

"Major rule" is defined in S. 1080 as a rule that causes or is likely to cause "an annual effect on the economy of $100 million or more in direct or indirect enforcement and compliance costs"; or likely to result in a substantial increase in costs or prices or cause "significant adverse effects on competition, employment, investment, productivity, innovation, the environment, public health or safety, or the ability of enterprises where principal places of business are in the United States to compete in domestic or export markets," or "other effects that warrant subjecting the rule to a regulatory analysis. . . ."

The "regulatory analysis" that would be required for all major rules must contain a complex, detailed description and comparison of the benefits and costs of the rule, and of reasonable alternatives to the rule, based upon a detailed record. In addition, except where a statute directs otherwise, the analysis must also explain why the benefits of the rule justify its costs, and why the rule is more cost-effective than the alternatives in achieving the objectives of the rule.

Since the executive oversight provisions would apply to implementation of the "major rule" concept, I believe it would be appropriate to review the necessity for adopting this proposal. As I understand it, when the major rule concept applied, it would require the addition to the regulatory process of a series of detailed and complex cost benefit analyses. I am concerned that these new requirements will result in a substantial increase in paperwork, additional costly informational burdens on both the agency involved and the public, judicial challenges, and, most important, lengthy delays in administrative action. It is my judgment that the objectives of regulatory simplification and avoidance of unnecessary regulation would not be accomplished by an additional layer of administrative requirements.

Executive oversight as applied to this "major rule" concept would add still another unnecessary complexity. However, there is an additional reason to be concerned about the provisions for executive oversight in the rulemaking process, particularly with respect to the operations of the Federal Reserve System. As I know you are aware, the Congress created the Federal Reserve System in 1913 as an independent entity in order to emphasize the insulation of the credit regulation process from the function of financing the government. Long experience demonstrates that the separation of these two functions can make a vital contribution to a more stable and effective domestic monetary system. Therefore, I would be particularly concerned about executive oversight as applied to the functions of the Federal Reserve System.

This is not only true because of the broad policy considerations I have just outlined, but also because of the fact that this would run directly counter to one of the major objectives that Congress sought to achieve in creating specialized agencies. The significant mandate that the President would receive under the executive oversight concept to interfere in the regulatory process could significantly defeat the purpose of assuring regulation based on expert judgment on the merits of both general policy and particular cases.

This is not to say, of course, that the regulatory process should not be subject to Congressional scrutiny and to the requirement of the adoption of every step feasible to lighten and simplify the existing regulatory burden as well as the avoidance of unnecessary regulation in the future. These objectives, I wish to reemphasize, can be achieved most efficiently by analysis of individual agency functions rather than through the adoption of new, across-the-board requirements that rigidify and expand regulatory burdens as well as impair basic Congressional policies calling for regulatory independence and expertise through the multiplication of decision-making layers.

I appreciate having had this opportunity to offer these comments on S. 1080.

Sincerely,

Paul A Volcker

SEP 4 1981

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

SEP 1 1981

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your inquiry of July 30, 1981, regarding Section 624 of S. 1080, as reported from the Judiciary Committee. That section would authorize the President to establish procedures implementing the bill's requirement that agencies prepare regulatory analyses before proposing or promulgating certain substantive rules. It would also empower the President to "monitor, review, and ensure agency implementation of such procedures" and would require the President to report annually to Congress on agency compliance.

The meaning of Section 624 is not entirely clear. Insofar as the section may be read only to authorize the President to establish the procedures by which agencies would develop regulatory analyses for their rules, the Commission questions the necessity for such authority in light of other provisions of S. 1080, as discussed below. Insofar as proposed Section 624 may be read to permit the executive branch effectively to control the outcome of rulemaking proceedings of independent agencies, the provision would effect a fundamental alteration of the character of such agencies that is inconsistent with the role Congress has traditionally conceived for them.

The Commission recognizes that the members of independent agencies can benefit from the views of other policy-makers in the government, particularly those with a broader official perspective. Indeed, two of the Commission's members recently voted in favor of a proposal to provide the Office of Management and Budget a special opportunity to comment on draft rules and regulatory analyses before the Commission formally proposes or adopts new regulations. (See the enclosed copy of the Commission's letter of June 25, 1981, to the Vice President.) While the Commission's other two members concluded that the executive branch now has adequate opportunity to influence the Commission's rulemakings through the Commission's regular procedures for public participation, all four agree that participation of the executive branch through submission of comments, arguments, and information to the Commission can be quite valuable.

A statutory requirement that all agencies consult with the President before promulgating new rules could yield significant benefits. However, this does not appear to be the purpose of Section 624. Narrowly read, the section would simply authorize the President to establish the procedures by which agencies would develop regulatory analyses for their rules. This seems unnecessary in that Sections 553 and 622 of S. 1080 already provide a fully adequate procedure by which preliminary regulatory analyses would be published with a proposed rule, and the public, as well as government officials, would be provided the opportunity for both written and oral presentation of data, views, and information before a final analysis and rule were adopted. There seems little need for a further delegation by Congress to the President of the authority to establish more elaborate procedural requirements for the development of regulatory analyses than those Congress itself creates for the development of rules.

Section 624 is also amenable to a much broader reading: that is, it could authorize the President to develop procedures by which the executive branch would review the analyses developed by independent agencies for "agency compliance with chapter 6 of this title," i.e., for substantive adequacy. The President might also develop guidelines, based upon his views of public policy, for the substantive content of analyses, as he has done in Executive Order 12291.

Control by the executive branch over the substantive outcome of agency rulemakings is inconsistent with the traditionally independent character of such agencies. */

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*/ "The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation

[Footnote continued.]

Such agencies are generally governed by a collegial body whose membership is required by statute or tradition to be bipartisan. Members serve a fixed term, giving some measure of stability and continuity to the life of these agencies. Many members bring to their agencies a well-developed expertise in the particular areas of regulation for which their agencies are responsible, and other members develop an understanding of these often complex subject areas during the early years of their terms. It has been felt in the past that Executive oversight of the activities of such agencies would be unnecessarily duplicative. Moreover, Congress has been reluctant to give control of these agencies, whose authority is in part legislative, to the executive branch.

Having created an agency as an arm of itself, exercising its delegated authority, and accountable to it for the result, Congress may, of course, alter that situation and shift control of agency rulemakings to the executive branch. The Commission believes, however, that such a substantial shift of authority, if it is intended by Congress, should be made explicitly and not be left to occur inadvertently through ambiguous statutory language.

The Commission believes that Section 622 of S. 1080 amply enunciates a substantive standard for regulatory analyses. If the Committee feels that greater specificity is needed, the Commission suggests that it be included in Section 622 rather than be left to development by the Executive.

To the extent that Section 624 is designed to assure compliance with Section 622 by providing for substantive review by the President of agencies' regulatory analyses, the Commission questions the necessity for such review, given the substantial role already played by congressional oversight, judicial review, and, in the case of the Commission, the legislative veto. While the Congress might wish the President's aid in monitoring compliance with the requirements of Section 622, Section 624 is much broader than is needed to accomplish that task.

As stated above, the Commission sees merit in a statutory requirement that independent agencies consult with the executive branch regarding their rulemakings.

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*/ [Cont'd]

of the statute, must be free from executive control." Humphrey's Executor v. United States, 295 U.S. 602, 628 (1935).

However, the Commission would urge that three conditions be placed upon such a requirement, so as to preserve the integrity of the rulemaking process, avoid undue delay, and reserve to the independent agencies the authority delegated to them by Congress. First, the Commission recommends that the President's views, or those of his designee, be placed on the record of the rulemaking for public inspection. Second, the Commission urges that the Executive's opportunity for comment be limited to a specific time period. This is important not only to avoid delay in itself, but also because the ability to delay agency activity can be used to affect the substantive outcome of agency decisions. Finally, the Commission urges that if the Executive's role is to be more than advisory (which it does not recommend), then any veto-type authority delegated to the Executive should be subject to an override by a vote of a majority of an independent agency's members. An example of each of these features appears in Section 3507 of the Paperwork Reduction Act of 1980. **/

**/ "(b) The Director shall, within sixty days of receipt of a proposed information collection request, notify the agency involved of the decision to approve or disapprove the request and shall make such decisions publicly available. If the Director determines that a request submitted for review cannot be reviewed within sixty days, the Director may, after notice to the agency involved, extend the review period for an additional thirty days. If the Director does not notify the agency of an extension, denial, or approval within sixty days (or, if the Director has extended the review period for an additional thirty days and does not notify the agency of a denial or approval within the time of the extension) a control number shall be assigned without further delay, the approval may be inferred, and the agency may collect the information for not more than one year.

"(c) Any disapproval by the Director, in whole or in part, of a proposed information collection request of an independent regulatory

[Footnote continued.]

The Commission appreciates this opportunity to share its views with the Committee.

By direction of the Commission.

Carol M. Thomas
Secretary

Enclosure

**/ [Cont'd]

agency, or an exercise of authority under Sections 3504(h) or 3509 concerning such an agency, may be voided, if the agency by a majority vote of its members overrides the Director's disapproval or exercise of authority. The agency shall certify each override to the Director, shall explain the reasons for exercising the override authority. Where the override concerns an information collection request, the Director shall without further delay assign a control number to such request, and such override shall be valid for a period of three years." 44 U.S.C. § 3507.

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FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE CHAIRMAN

JUN 25 1981

Honorable George Bush
Vice President of the United States
The White House
Washington, D.C. 20501

Dear Mr. Vice President:

The Federal Trade Commission is pleased to respond to your letter and memorandum of March 25, 1981. The Commission pledges its continued participation in the Regulatory Calendar and its full support for the policies and goals reflected in President Reagan's Executive Order 12291 on federal regulation. The Commission shares the President's determination that regulatory objectives be met at the minimum net cost to society.

The primary source of the Commission's rulemaking authority is Section 18 of the Federal Trade Commission Act, which authorizes the Commission to promulgate rules defining unfair or deceptive acts or practices. Such rules may also impose affirmative requirements upon industry designed for the purpose of preventing such acts or practices. The Commission is also empowered by Section 6(g) of the FTC Act to promulgate rules relating to unfair methods of competition; however, no such rules have been adopted. Several other statutes, such as the Magnuson-Moss Warranty Act, authorize implementing regulations in their narrow subject areas.

The Commission's own rulemaking policies are fully consistent with those reflected in Section 2 of Executive Order 12291. In order to assure that the Commission's decisions are based on adequate information concerning the need for and consequences of proposed rulemaking, the Commission in June 1978 established the Impact Evaluation Unit in the Bureau of Consumer Protection. One of the responsibilities of this unit is to conduct prospective studies to ensure that new regulatory proposals are designed to provide benefits that substantially exceed their costs. Persons outside the agency are also encouraged to provide the Commission with information on the need for, and the potential costs and benefits of, possible regulations even before a notice of proposed rulemaking is published. In an advance notice of proposed rulemaking, the Commission describes its regulatory objectives and identifies regulatory alternatives under consideration, as required by Section 18(b)(2) of the Federal Trade Commission Improvements Act of 1980, 94 Stat. 376. The Commission also invites interested persons to comment on the rulemaking under consideration and to propose additional alternatives for achieving the Commission's objectives.

The preliminary regulatory analysis that the Commission must issue in connection with the publication of a notice of proposed rulemaking further assures that the Commission will have an adequate factual basis for a decision whether to promulgate a rule. Under Section 22 of the FTC Act, as amended, 94 Stat. 374, 388, that analysis must contain:

(1) a concise statement of the need for, and the objectives of, the proposed rule;

(2) a description of any reasonable alternatives to the proposed rule which may accomplish the stated objective of the rule in a manner consistent with applicable law; and

(3) for the proposed rule, and for each of the alternatives described in the analysis, a preliminary analysis of the projected benefits and any adverse economic or other effects and a preliminary analysis of the effectiveness of the proposed rule and each alternative in meeting the stated objectives of the proposed rule.

The Commission is also required under Section 22 of the FTC Act to issue a final regulatory analysis of each rule at the time of promulgation containing:

(1) a concise statement of the need for, and the objectives of, the final rule;

(2) a description of any alternatives to the final rule which were considered by the Commission;

(3) an analysis of the projected benefits and any adverse economic or other effects of the final rule;

(4) an explanation of the reasons for the determination of the Commission that the final rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen; and

(5) a summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues.

The Commission closely reviews each regulatory proposal brought before it for final approval to ensure that federal regulatory action is necessary and that the proposed rule minimizes any burden imposed on industry, especially small businesses. If these conditions are not met, the Commission will terminate the proceeding without promulgating any rule.

The Commission uses the tools of zero-based budgeting, quarterly budget reviews, and bimonthly policy review sessions to help it pinpoint those areas of activity which promise the greatest benefits in terms of increased competition and reduced consumer deception in the marketplace. In this manner the Commission, consistent with Section 2(e) of the President's Order, is already "set[ting] regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future."

The Commission's current practices are also consistent with the concept of regulatory impact analysis reflected in Section 3 of Executive Order 12291. The preliminary and final regulatory analyses required by the Federal Trade Commission Act are substantially similiar to the analyses required of the executive agencies for major rules under subsection 3(d). In addition to complying fully with its own statute, the Commission will make every effort to include the information listed in subsection 3(d) within its final regulatory analyses of all rules that would be considered "major" under the Order. Moreover, the Commission will be guided by that subsection in drafting its preliminary regulatory analyses of all rules, as well as its final analyses of rules that may not be considered major.

In order to assist OMB further in the execution of its responsibilities under subsection 6(a)(5) of the Order, the Commission will send the Director copies of its advance notices of proposed rulemaking and its semiannual regulatory agendas, as well as its published notices of proposed and final rulemaking.

The four members of this Commission are evenly divided on the question of complying voluntarily with Section 3 of Executive Order 12291, which provides for OMB review of notices of proposed rulemakings and preliminary regulatory analyses, as requested by your letter. The absence of a majority renders the Commission legally unable to comply with your request. The Commission believes, however, that it would be useful to state the divergent views of individual members of the Commission.

Commissioner Bailey and I believe that even though the Commission is not required, by virtue of its independent status, to comply with Executive Order 12291, the Commission should provisionally determine to send to the Director of the Office of Management and Budget notices of proposed rulemaking and preliminary regulatory analyses in future major proceedings. Under such a procedure, these would be provided to OMB at the same time they are sent to Congress under Section 18(b)(2)(B) of the Federal Trade Commission Act, as amended, i.e., at least thirty days before publication. OMB comments would be fully considered by the Commission in issuing preliminary and final regulatory analyses. As to major rulemakings that are already in progress, Commissioner Bailey and I would send final regulatory analyses to OMB for review at least thirty days prior to publication. We would also send for review final regulatory analyses that differ substantially from preliminary analyses reviewed by OMB. All comments would be included in the rulemaking records and would be considered to the fullest extent practicable.

However, Commissioner Bailey and I believe that if OMB was unable to comment on a final regulatory analysis before the Commission felt it must move forward to promulgate a rule, there would still be an opportunity for OMB comment. No rule promulgated by the Commission before September 30, 1982, will take effect for at least ninety days of continuous Congressional session after promulgation, because of the legislative veto provisions in Section 21 of the FTC Act, as amended, 94 Stat. 374, 393.

For rules that are not major, Commissioner Bailey and I would, consistent with Section 3(c)(3) of the Executive Order, send OMB notices of proposed rulemaking and final rules ten days before publication. Such notice would also be given for final major rules where OMB had already reviewed a preliminary regulatory analysis that was substantially the same as the final analysis.

[7] While Commissioner Dixon recognizes the value in apprising the Office of Management and Budget of regulatory proposals throughout the government so that it may identify duplicative, overlapping, and conflicting proposals, as well as those that "are inconsistent with the policies underlying statutes governing agencies other than the issuing agency or with the purposes of [the President's] Order," he believes that Congress' determination to establish the Commission as a regulatory agency independent of the Executive Branch makes it inappropriate for the Commission to submit regulatory analyses and notices of proposed and final rulemaking to that Office for review prior to publication.

Commissioner Dixon believes that the rulemaking process is presently structured in a way that will provide OMB with ample opportunity to comment without infringing upon the independence of the agency.

Commissioner Pertschuk opposes prepublication review by OMB of the Commission's notices of rulemaking and regulatory analyses. He believes the FTC Improvements Act of 1980, through its creation of an elaborate system for legislative oversight of Commission rulemaking, reaffirmed the Congress' determination that the Commission is an agency independent of the Executive Branch. The new Act requires Commission procedures which afford ample opportunities for OMB and other interested parties to provide timely comment on the impact of any proposed rule. In Commissioner Pertschuk's view, however, the Act does not contemplate or permit special opportunities for review by OMB. For these reasons, Commissioner Pertschuk would consider any initiative by the Commission, without authorization from Congress, to provide preferential status to OMB in our rulemakings to be a violation of the principle of independence reaffirmed by Congress in the FTC Improvements Act. For a fuller statement of Commissioner Pertschuk's views on this issue, see his separate statement attached to this letter.

By direction of the Commission.

David A Clanton

David A. Clanton
Acting Chairman

Separate Statement
of
Commissioner Pertschuk

I oppose the Administration's request that the Commission submit its notices of rulemaking and regulatory analyses to the Office of Management and Budget for final review prior to their publication.

The last Congress addressed itself specifically to the Commission's rulemaking processes. In so doing it made very clear its intention that all interested parties, including other government agencies, be afforded full opportunity for informal comment to the Commission in response to a mandatory advance notice of proposed rulemaking. It also affirmed, in no uncertain terms, the Commission's special status as an agency independent of the Executive Branch and responsive to the Congress. It did so in two particulars: (1) by requiring a 30 day period for pre-publication review of notices of proposed rulemaking and preliminary regulatory analyses by the oversight committees of Congress; and (2) by establishing an elaborate system of Congressional veto to which all Commission rules henceforth are to be subjected.

Under these procedures, OMB as well as other government agencies will have ample opportunity, along with all other interested parties, to comment both informally, in response to advance notices of proposed rulemaking, and formally, on the record, in our rulemaking proceedings.

As the text of this letter abundantly demonstrates, the Commission's procedures are now structured to afford exhaustive opportunity for OMB to provide the Commission timely counsel on the impact of any proposed rule.

Presidential oversight of FTC rulemaking is neither contemplated by nor consistent with the system for Congressional review of Commission rules. Indeed, if OMB were given special access to the Commission's final notices of rulemaking and final regulatory analyses prior to their publication, it would have an opportunity for advance review that Congress did not even confer upon itself. For these reasons, I would consider any initiative by the Commission, without authorization from Congress, to provide preferential status to the executive branch in our rulemakings to be a violation of the principle of independence reaffirmed by Congress in the FTC Improvements Act. I therefore oppose and would dissent from any action by the Commission to give OMB an opportunity for pre-publication review of the Commission's notices of rulemaking and regulatory analyses.

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

May 20, 1981

Honorable David A. Stockman
Director, Office of Management & Budget
Executive Office Building
Washington, D.C. 20503

Dear Mr. Stockman:

This is in response to your office's request for comments on S. 1080, a bill to amend the Administrative Procedure Act.

The Federal Trade Commission supports the regulatory reform goals embodied in this bill and provided testimony in support of several reform bills introduced during the Ninety-Sixth Congress. During that Congress, the Federal Trade Commission Improvements Act of 1980 was passed, legally obligating the Commission to develop regulatory analyses for proposed and final regulations promulgated under the Federal Trade Commission Act. 94 Stat. 374, 388. That Act also requires the Commission to publish a regulatory agenda semiannually. The Commission's limited experience to date under the Improvements Act confirms its belief that both regulatory analyses and regulatory agendas are very useful tools not only for informing the public of Commission activities and helping interested persons participate meaningfully in its rulemakings, but also for aiding the Commission in managing its own regulatory initiatives.

The Commission believes that the drafters of S. 1080 have correctly recognized that the costs and, particularly, the benefits of regulation are often at least in part nonquantifiable. The Commission supports the decision that the bill not include a rigid requirement that the benefits of rules outweigh their costs, but rather that it require agencies to determine that the benefits of their rules justify the costs. While such determinations are not demanded of the Commission by the FTC Improvements Act, the Commission's decisionmaking reflects such a standard, and the Commission believes that it should be applied to every rule.

The requirements in S. 1080 for regulatory analyses go beyond those in the FTC Improvements Act in another, much more substantial, respect. Under Section 3 of the bill, 5 U.S.C. § 553 would be amended to require an agency to publish an explanation why a proposed major rule "is likely to substantially achieve the rulemaking objectives in a more cost-effective manner than the alternatives to the proposed rule." Sec. 553(c)(2)(D). In promulgating a major rule, an agency would have to make a "reasonable determination" that the rule "will substantially achieve the rulemaking objectives in a more cost-effective manner than the alternatives described in the rulemaking." Sec. 553(e)(2)(B) (emphasis added).

The Commission agrees with the principle that agencies should seek to execute their regulatory responsibilities in such a way as to minimize the burdens on those they regulate. However, regulatory burdens are often extremely difficult to calculate before they have been imposed, even when they are, theoretically, quantifiable. Estimates on costs can vary widely, depending on their source and the nature of the costs involved, as can estimates of the benefits to be achieved from a rule. Moreover, as noted above, the benefits of regulation are often nonquantifiable. Thus, reasonable people can in good faith reach different conclusions as to what regulatory remedies are least burdensome, as well as to whether different remedies substantially achieve the same goals.

For these reasons, the Commission is concerned about the fact that an "inadequate" determination regarding the costs and benefits of a rule will give rise to a new basis for judicial review. Sec. 553(f)(3). In addition, it is not clear how the inadequacy of a cost-benefit analysis could render a rule unlawful under Section 706(a)(2)(A), (B), or (C) of Title 5. Could a court find an otherwise lawful rule to be "in excess of statutory authority" if it disagreed with the agency's determination that no other alternative would substantially achieve the same objectives with less costs? Unfortunately, the bill will prompt a considerable amount of litigation over the accuracy of regulatory analyses and the meaning of proposed Section 553(f)(3), if it is retained as written.

Such litigation would be unfortunate not only because of the resources it would consume and the further delays it would bring to the regulatory process, but also because it could cause all concerned to lose sight of the managerial utility of cost-benefit analyses and reduce the candor of both government officials and private parties in developing information on regulatory alternatives.

The Commission views regulatory analyses fundamentally as management tools and tools for legislative oversight. Thus, it feels Congress chose properly in deciding not to make its regulatory analyses under the FTC Improvements Act subject to judicial review. Similarly, it believes that Section 553(f)(3) in this bill should be redrafted to preclude judicial review of an agency's methodology or the presentation of its analyses. H.R. 746, introduced in the House of Representatives by Representative Danielson on January 6, 1981, contains language in its proposed Section 623(b) of Title 5 that would achieve this purpose, as does Section 22(c) of the FTC Act, as amended. 94 Stat. 374, 390.

The Commission urges the substitution of this or similar language for that currently in proposed Section 553(f)(3).

The drafters of S. 1080 have recognized that cost-benefit analyses are themselves expensive and, thus, not always cost-effective. The Commission believes that the bill's definition of "major" rules would provide useful guidance to agencies in making management decisions whether to conduct such analyses. However, the definition is too imprecise to serve as a basis for judicial review. Reasonable decisions that rules are not major will likely be challenged, if judicial review is available, simply as a means of delay. The Commission believes that the best course is to include a provision in the bill declaring that any determination that a rule is not a major rule shall not be subject to judicial review.

S. 1080 also seeks to prescribe the content of rulemaking records for purposes of judicial review and to preclude agency reliance on extra-record evidence. However, proposed subsections (e) and (f) to Section 553 appear to be somewhat inconsistent. Subsection (f) allows for the creation of a nonpublic portion of a rulemaking record, which could contain material exempt from public disclosure under the Freedom of Information Act, such as confidential commercial information. The purpose of this allowance is defeated, however, by the requirement in subsection (e)(4) that all material relied on by an agency must be identified in the notice of proposed rulemaking, included in the "rulemaking file" (i.e., the public portion of the rulemaking record), or referred to in a notice that the agency "intends to take notice of information appearing elsewhere." Changing the reference to the "rulemaking file" to a reference to the "rulemaking record" would resolve this conflict without any sacrifice in the implementation of the goals of this subsection.

Under S. 1080, all major rules would be subject to a cost-benefit review and renewal, rescission, or amendment every ten years. The Commission believes that the review of major regulations after promulgation, in order to assess whether they are accomplishing their objectives at the lowest cost, is an important component of responsible rulemaking. Indeed, in 1978 the Commission established the Impact Evaluation Unit in its Bureau of Consumer Protection to do just that. One responsibility of that unit has been to determine whether the Commission's regulatory actions have been beneficial to consumers and to assess the impact of such actions on industry, especially small businesses.

The Commission is obligated by the FTC Improvements Act of 1980 to publish a regulatory agenda semiannually, as noted above. The Commission supports the requirement in S. 1080 that all agencies adopt this practice. It is an inexpensive tool for assuring advance public notice of the government's rulemaking activities, while also aiding agencies in the management of those activities. The Commission suggests, however, that a provision be added to proposed Section 561 as follows: "An agency may publish an agenda required by this section in conjunction with or as part of any other agenda required by any other law, if such agenda satisfies, or is not inconsistent with, the requirements of this section." This language is similar to that contained in proposed Section 553(f)(4) and in Section 605 of the Regulatory Flexibility Act, 94 Stat. 1164.

The bill makes major substantive changes in the existing judicial review provision of the Administrative Procedure Act, 5 U.S.C. § 706. The Commission supports the objectives of the proposed changes. It believes, however, that some of the specific statutory language proposed may lead to an increase in the cost, length, and complexity of litigation, as well as to uncertainty in the law.

One change, proposed subsection 706(a)(2)(F), would establish a new standard for judicial review of informal rulemaking proceedings conducted under 5 U.S.C. § 553. A reviewing court would be directed to set aside a notice-and-comment rule if it found that the rule was promulgated "without substantial support in the rulemaking file, viewed as a whole, for the asserted or necessary factual basis of the rule." According to Senator Bumpers, the originator of this language, the words "substantial support" would require that the materials upon which an agency based its factual determinations be "reliable and credible".[1] The change is intended to be consistent with Recommendation 74-4 of the Administrative Conference of the United States, 1 C.F.R. § 305.74-4, which discusses the need to clarify the appropriate scope and standard of review for rules of general applicability.[2] Recommendation 74-4 describes the appropriate standard for review of informal rules as follows:

> Where such a rule is attacked on the ground that an asserted factual basis does not support it or that a necessary factual foundation is lacking, this standard requires a reviewing court to decide, in light of the information

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[1] 127 Cong. Rec. S 4240 (daily ed. April 30, 1981) (remarks of Senator Bumpers).

[2] *Id.*

> before it * * * whether the agency's conclusion concerning the significance of factual information can be said to be *rationally supported*. [Emphasis added.] [3]

While the objective is clear, there is the risk that the proposed language, "without substantial support in the rulemaking file," which is strikingly similar in phrasing to the "substantial evidence" standard for review of adjudication and formal rulemaking, may invite a higher degree of judicial scrutiny than is intended. This risk would be avoided, and the statutory language will more accurately reflect the legislative intent, if the adjective "reasonable" replaced the term "substantial" in subsection (a)(2)(F).

Another proposed change would insert the word "independently" before the word "decide" in the first sentence of Section 706 and would add a subsection (c) providing that, in making determinations on questions of law, a reviewing court shall not accord any presumption for or against agency action, and that the court shall determine whether an agency acted in excess of its jurisdiction "on the basis of the language of the statute or, in the event of ambiguity, other evidence of ascertainable legislative intent."

According to Senator Bumpers, these changes are intended to direct reviewing courts to take a "hard look" at an agency's assertions of regulatory jurisdiction or authority [4] and "to perform, and to perform diligently, their traditional role as the ultimate and impartial interpreters of the law."[5] On the other hand, the proposed language is not intended to preclude a reviewing court from giving weight to an agency's interpretation of its authorizing legislation in appropriate cases, nor does it apply to policy determinations or factual findings.[6]

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[3] The courts have recognized that rulemaking agencies are entitled to draw upon their own expertise to interpret, understand, or draw conclusions from factual material contained in the rulemaking record. See, *e.g.*, *United States Lines* v. *FMC*, 584 F.2d 519, 534-35 n.44 (D.C. Cir. 1978); *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 28 (D.C. Cir.) (*en banc*), *cert. denied sub nom.* *E.I. Du Pont de Nemours & Co.* v *EPA*, 426 U.S. 941 (1970). Likewise, in areas where no factual certainties exist, or where facts alone do not provide a definitive answer, agency policy judgments have been used to supplement factual determinations. *E.g.*, *FCC* v. *WNCN Listeners Guild*, 49 U.S.L.W. 4306, 4310 (Mar. 24, 1981) *Society of the Plastics Indus., Inc.* v. *OSHA*, 509 F.2d 1301, 1304 (2d Cir. 1975); *Synthetic Organic Chem. Mfgrs. Ass'n* v. *Brennan*, 503 F.2d 1155, 1157-58 (3d Cir. 1974); *Industrial Union Dept., AFL-CIO* v. *Hodgson*, 499 F.2d 467, 474 (D.C. Cir. 1974).

[4] Remarks of Senator Bumpers, *supra*, at 4239.

Agency action is frequently based on the resolution of mixed questions of law, fact, and policy. The Commission is concerned that by making the difference between law, policy, and fact so critical, this language may add significantly to the cost and complexity of litigation. Moreover, by presuming the existence of standards to distinguish questions of law, fact, and policy, the specific proposed statutory language may, contrary to congressional intent, lead to excessive judicial intrusion into specialized decisionmaking by agencies regarding complex issues of fact or policy. Because there is no distinct line between law, policy, and fact, there is risk that a reviewing court erroneously would treat a particular issue presented for review as a question of law with respect to which the court could completely substitute its judgment for that of the agency. See, e.g., WNCN Listeners Guild v. FCC, 610 F.2d 838, 854-55 (D.C. Cir. 1979), rev'd, 49 U.S.L.W. 4306 (Mar. 24, 1981). Furthermore, in many instances issues of law, fact, and policy are inextricably intertwined. For example, the Commission's decisions on whether particular business practices transgress statutory standards necessarily turn in part on our analysis of the facts and the exercise of our discretion in matters of policy.

Although the Commission believes that retaining the present statutory language is the preferable course, it believes that excessive and unwarranted judicial intrusion into decisionmaking by the agencies on specialized questions of policy and fact can be minimized if it is apparent from the language of the statute that the primary purpose of the provision is simply to preclude uncritical deference by a reviewing court to an agency's legal conclusions. This is consistent with the intent that "the court may not regard the agency's reading of the statute as controlling or entitled to a deference that would avoid the court's reaching its own independent judgment."[7] A clarification could be implemented through the substitution of the sentence, "In making the foregoing determinations, the court shall not conclusively presume that agency action is valid," for the first sentence of subsection (c). In this manner, a reviewing court would be precluded from regarding an agency's reading of its own enabling statute as controlling, or entitled to a deference which would preclude a "hard look" at the legal underpinnings of the agency's action. At the same time, it would avoid the troublesome distinction between law, fact, and policy.

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[5] Id. at 4240.

[6] Id.

[7] Id.

The Commission appreciates this opportunity to express its views on this important bill and hopes that its suggestions will be helpful in accomplishing the bill's goals.

By direction of the Commission.

Carol M. Thomas
Secretary

Interstate Commerce Commission
Washington, D.C. 20423

OFFICE OF THE CHAIRMAN

September 4, 1981

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Thank you for your letter requesting the Commission's further comments on the provisions of S. 1080, the "Regulatory Reform Act". The Commission is pleased to provide you with our thoughts on the executive oversight provisions contained in S. 1080, as reported by the Senate Judiciary Committee.

As you know, the Commission commented previously on this legislation by letter dated July 10, 1981. Before addressing the issue of executive oversight, I would like to summarize briefly the Commission's views on S. 1080 and other regulatory reform proposals.

The Commission shares the concerns of many Members of Congress that regulations should be made more cost-effective and less burdensome on the public. Although we have some reservations about certain of the means proposed in S. 1080 to accomplish the goals of regulatory reform, I would like to emphasize our strong endorsement of those goals. Our commitment to regulatory reform is reflected in the steps we have taken on our own initiative toward that objective. Regulatory analysis is presently an integral part of the Commission's rulemaking process. Proposed rules are analyzed from both a legal and economic standpoint, exploring the policy objective involved and its anticipated effects on the transportation industry and the public. In addition, the Commission is actively involved in a continuing program of reviewing existing regulations. The Commission is committed to improving the regulatory process and stands ready to cooperate fully with Congressional initiatives in this area.

Let me turn now to the specific concerns raised in your letter. S. 1080, as reported by the Senate Judiciary Committee, contains a number of provisions which would considerably broaden the scope of executive oversight of regulatory activity, particularly of independent agencies. Section 622(b) would allow the President or his designee (presumably OMB) to designate a rule as a major rule, thereby subjecting such rule to the regulatory analysis provisions of S. 1080. As I mentioned earlier, regulatory analysis is currently an integral, rather than separate, part of the Commission's rulemaking process. We believe that the thorough evaluation of proposed rules and alternative approaches is necessary in order to ensure that the final rule is effective and not unduly burdensome. Although we are concerned that the formalized procedure for regulatory analysis contained in S. 1080 could significantly increase the cost and time required to implement new rules, we are committed to the general concept of regulatory analysis. Because of this commitment, we do not feel that the authority granted to the President in Section 622(b) would pose serious problems for the Commission in fulfilling its responsibilities in an effective and expeditious manner.

However, the provisions of Section 624 raise questions which are more troublesome. Section 624 would give the President the authority to establish procedures for agency compliance with the legislation's requirements for major rulemaking proceedings, including the preparation of regulatory analyses. In addition, the President would be given "the authority to monitor, review, and ensure agency implementation of such procedures." On the surface, the executive oversight envisioned in Section 624 would seem to be merely procedural. The legislation as a whole makes extensive reforms in the regulatory process, and the provisions regarding executive oversight grant the President the explicit authority to ensure that these reforms are carried out uniformly by all federal agencies.

Since the Commission intends to implement faithfully any regulatory reform legislation enacted by Congress, we are not concerned about this type of procedural oversight. However, the authority granted to the executive under the provisions of Section 624 is extremely broad and vaguely defined. We are concerned about the possibility that this provision, as presently drafted, could be construed to allow the President to exercise a considerable degree of substantive control over the regulatory process.

For example, the language could be interpreted to allow the President to extend the provisions of Executive Order 12291 to govern rulemaking by independent agencies that are not presently governed by it. Under the provisions of Section 3 of Executive Order 12291, executive agencies must submit all proposed and final rules to the Director of OMB prior to publication. For major rules, this transmittal must occur as much as 60 days before publication. In the case of proposed rules, the Director of OMB can delay the publication of a notice of proposed rulemaking until after the completion of consultations between the agency and OMB and the conclusion of OMB review of the proposal. Moreover, the authority to monitor agency compliance implies that OMB could further delay publication or modify a proposed rule by rejecting the regulatory analysis. In addition, publication of final rules can be delayed until after the views of the Director of OMB and the agency's response to them have been incorporated into the rulemaking file.

The Commission is concerned about these pre-clearance procedures for a number of reasons. To begin with, we are concerned that the time required for pre-clearance of all proposed and final rules would add additional delay to a process that is already too lengthy in some cases. This type of pre-clearance could also have a significant chilling effect on the development of proposed rules. We can envision a possible scenario where the executive branch could delay or modify a proposed rule before it was ever published by requiring the agency to prepare another regulatory analysis to accompany the proposal. These pre-clearance procedures would also give interested parties an opportunity to influence the rulemaking process through comments to members of the executive branch which would not be on the record (since the proposed rule would not yet have been published), and with respect to which other parties would not have an opportunity to respond. Because of our concern that all interested parties be afforded due process, we are particularly troubled by this potential for ex parte contacts, especially prior to the publication of a proposed rule.

Moreover, we do not believe that this type of oversight is necessary to accomplish the goals of the legislation. The requirements for regulatory analysis and the elements of such analysis are explicitly stated in S. 1080. In addition, S. 1080 provides that the regulatory analysis would be considered as part of the rulemaking file in any court proceeding to determine the legality of a rule. We believe that these provisions are adequate to achieve the objectives of regulatory reform in an effective manner.

Because of potential problems we envision with the provisions of Section 624, we do not favor its approach to executive oversight. We believe that the language of Section 624 should be amended to define explicitly the authority granted to the President to ensure that the scope of such authority is truly procedural, rather than substantive, in nature. For example, we would have no objection to a requirement that agencies submit a copy of all proposed and final rules to the President or his designee at the same time they are submitted to the Federal Register for publication. We would also welcome comments from the executive branch on any of our rulemaking proposals, and we would carefully consider such comments along with those of other interested parties, as we develop final rules.

In closing, I would like to reiterate the Commission's wholehearted support for the goals of S. 1080. It is important that regulations be made more cost-effective and that the regulatory process be improved in order to reduce the burdens of regulation on the public. The Interstate Commerce Commission has taken steps to achieve these goals and stands ready to cooperate fully in implementing any legislation enacted in this area.

Again, I appreciate this opportunity to share with you the Commission's views on S. 1080. If I can be of any further assistance, please let me know.

Sincerely yours,

Reese H. Taylor, Jr.

Reese H. Taylor, Jr.
Chairman

Interstate Commerce Commission
Washington, D.C. 20423

OFFICE OF THE CHAIRMAN

JUL 10 1981

The Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, DC 20510

Attention: Miss Pauline Hildebrandt

Dear Chairman Roth:

I appreciate this opportunity to present the views of the Interstate Commerce Commission on S. 1080, the Regulatory Reform Act. The Commission wholeheartedly endorses the goals of S. 1080--to make regulations more cost-effective and to improve the regulatory process in order to reduce the burdens of regulation on the public. We have, however, some reservations about certain means proposed in S. 1080 to accomplish these goals.

As you know, the Interstate Commerce Commission is an independent regulatory agency which was created as an arm of Congress and, therefore, is not part of the executive branch. In particular, the Commission is not subject to the two most recent executive orders dealing with regulatory reform--Executive Order 12044 issued by President Carter in 1978, and Executive Order 12291 issued by President Reagan on February 17, 1981.

Nonetheless, we have recognized our responsibility to improve the regulatory process and reduce burdens on the public, and have taken steps on our own initiative to achieve those goals. Specifically, on June 26, 1978, the Commission issued a policy statement in response to Executive Order 12044 which described the procedures by which the Commission develops new regulations, selects existing regulations for review, and encourages public participation in the rulemaking process. A copy of this policy statement is enclosed for your information. We believe that these procedures achieve most, if not all, of the objectives of regulatory reform in an effective manner. Nonetheless we review our procedures on an ongoing basis and are always open to improving them. I will first outline actions the Commission has taken in this area, and then turn to a discussion of some of the specific provisions of S. 1080.

Regulatory analysis is an integral part of the Commission's rulemaking process. Since the Commission's regulations almost always affect large numbers of carriers, major segments of the transportation industry, and significant numbers of users of transportation services, regulatory analyses are routinely performed as a prerequisite to the issuance of all notices of proposed rulemaking, except those determined to be of such limited significance or obvious merit that such analysis would not serve any purpose. Proposed rules are analyzed from both a legal and economic standpoint. This evaluation explores the policy objective involved in the proposal and its anticipated effects on the transportation industry and the public in terms of benefits and costs, weighing whether the anticipated costs would be justified by the expected benefits. The comparative costs and benefits of any alternative approaches are also analyzed. Although this analysis is not a separate study, the bulk of it is included in the notice of proposed rules to aid the public in formulating comments which will help the Commission to reach a final decision.

In addition to conducting comprehensive evaluations of proposed rules, the Commission is actively involved in a continuing program of review of existing regulations. The Commission selects rules for review either on its own initiative, as the result of complaints or suggestions from the public, or in response to a statutory mandate (such as the requirement in the Household Goods Transportation Act of 1980 that the Commission review all its regulations relating to the moving industry). During the course of this review, the Commission examines whether there is a continuing public need for the regulation. If the need still exists, we will ensure that the current rule is the most appropriate or revise it to better address the need to reduce costs and other burdens of compliance. If there is no reason for the rule, or the costs associated with the rule outweigh the benefit, then we will work to eliminate the rule.

Finally, the Commission has instituted a number of procedures to encourage public participation in the rulemaking process. Information from the public affected by our regulations is vital to the Commission's decisionmaking process. In fact, in some cases the Commission has published supplemental notices of proposed rulemaking requesting that the public respond to certain specific questions in order to obtain additional information needed to form the basis for a decision. In major proceedings, the Commission may hold hearings around the country in order to give members of the public as much opportunity as possible to express their concerns. The Commission's Office of Special Counsel also conducts outreach efforts to solicit public participation in order to ensure that all important aspects of the public interest are represented in the records of Commission proceedings. These efforts include the issuance of press releases as well as direct contact with interested parties to encourage participation and offer assistance.

Let me now turn to the specific provisions of S. 1080, the Regulatory Reform Act. The bill would amend the Administrative Procedures Act by establishing a set of elements which must be contained in any notice of proposed rulemaking or final rule. For all major rules, agencies would be required to compare the benefits and costs or adverse effects of a rule and to choose the alternative which achieves the rulemaking objectives in the most cost-effective manner, unless the enabling statute pursuant to which the agency is acting directs otherwise. The legislation also would require that agencies afford interested parties the opportunity to make oral presentations, including the opportunity for cross-examination, in order to resolve material issues of fact if other available procedures for resolving such issues are inadequate. Agencies would be required to conduct a periodic review of existing rules, policies, and practices. The legislation also contains a version of the so-called "Bumpers Amendment" which would remove the presumption in favor of agency action in judicial review proceedings. In addition, agency factual determinations in informal rulemaking proceedings would be required to have substantial support in the rulemaking record. S. 1080 addresses the "race-to-the-courthouse" problem by establishing a system whereby cases would be assigned randomly where such proceedings have been instituted in different courts within ten days of each other. Finally, each agency would be required to publish a semi-annual regulatory agenda listing the rules the agency expects to propose, promulgate, review, or withdraw in the succeeding year.

Before commenting specifically on these provisions, I would like to make a few general observations about the issue of regulatory reform. The overall goal is, of course, to improve the regulatory process in order to better serve the Nation's needs. However, it is important to recognize that there are a number of different subsidiary regulatory reform goals which are not always consistent with each other. An example of this is the potential conflict between the goal of reducing regulatory lag and other proposals, such as are included in S. 1080, which would actually lengthen the administrative process. Accordingly, it is necessary in evaluating regulatory reform proposals to consider whether the adoption of certain regulatory reform proposals will mesh with other reform goals or whether compromises among competing goals must be made. Of course, it is also necessary to consider what the goals are and whether the particular methods proposed serve the goals. I will be referring to these themes as I discuss the particular provisions of S. 1080.

Let me first discuss those provisions dealing with analysis of agency proposals; establishing agency priorities and schedules; agency review of rules, policies, and practices; and reorganizing and improving agency proceedings. Let me say first of all that we are in complete sympathy with the goal of improving government regulation at all phases of the process. As I noted earlier in this letter, many of the provisions contained in S. 1080 have in fact already been accomplished by the Commission itself. However, there are certain aspects of the bill which would in our view complicate, if not actually defeat, certain valid regulatory reform objectives--bearing in mind, as I said earlier, that the various objectives involved are not always consistent with each other.

We envision that these provisions could significantly increase the cost and time required to implement new rules. A major drawback is that agencies are required to comply regardless of whether a proposed rule increases or diminishes regulatory burdens. It seems quite probable that the procedures set forth in the bill for reviewing existing rules and policies, including the publication of the timetable for reassessing all major rules and the formal preparation of a statement on each rule analyzing the effects of and alternatives to that rule, would require a significant expenditure of administrative resources. Here again, we see a potential conflict with other objectives, including the desire of the President and Congress to reduce budgets for regulatory agencies.

Another potential problem arises from the fact that many of our rules are implemented pursuant to specific statutory directives. We have had considerable recent experience with statutorily-mandated rules, since three major laws affecting the ICC--each requiring a number of rules to be adopted--were enacted last year. What this means, in our view, is that many of the purposes which would be served by the provisions of S. 1080 in fact have already been served by the fact that Congress itself has mandated that various rules be adopted. In other words, the kind of analysis aimed at determining whether the rule is necessary or imposes burdens outweighing potential benefits has already been answered by Congress in such circumstances--it wants the rule adopted. Accordingly, if requirements of this type were adopted, we believe Congress should seriously consider modification or elimination of these requirements in those cases where the promulgation of the rule arises out of a specific statutory directive.

Let me now turn to the judicial review provisions of S. 1080. We believe several aspects of those provisions would be ill-advised. Most significantly, the bill would add a new subsection (c) to 5 U.S.C. 706, which would provide in pertinent part: "In making determinations on other questions of law, the court shall not accord any presumption in favor of or against agency action."

In our view, it is difficult to predict what, if any, actual effect this provision would have on the way courts review agency action. But there is a risk that it would significantly change judicial review of agency action; and that the results would increase rather than diminish the commonly perceived problems with the regulatory process. We believe this provision may add significantly to the complexity, costs and length of litigation; may reduce certainty and uniformity in the regulatory process; and may well result in more rather than less federal regulation of the American economy and society.

Under present law, it is firmly stated that, although the courts are the ultimate deciders of what the law requires and permits, an agency's interpretation of its own statute is entitled to considerable deference. See, e.g., Zenith Radio Corp. v. United States, 437 U.S. 443 (1978); Udall v. Tallman, 380 U.S. 1 (1965). This principle of deference is based on the reasonable assumption that in most cases the agency was itself involved in the legislative process and that the agency is more familiar, at least than the reviewing court, with the actual problems that particular legislative provisions were designed to remedy.

Although the proposed subsection (c) would appear to repeal this principle of deference, the results may not be significantly different from the current practice in cases involving narrow questions of statutory interpretation.

In many cases, however, questions of law, fact and policy are inextricably intertwined in the agency's decision. The clearest and most common example would be cases in which an agency is discharging its statutory mandate to decide whether a particular action or transaction would be in the "public interest" or "consistent with the public convenience and necessity." In one sense, an agency's resolution of that question involves a "question of law"--that is, the scope of the statutory terms. Usually, however, it also turns on the agency's assessment of the facts and on policy judgments by the agency.

In such cases, proposed subsection (c) might well be construed as giving the courts a free hand simply to substitute their own policy judgments and their own assessments of the facts for the agency's in deciding whether a particular agency action is in the public interest. We are concerned that this might result in a relitigation in the courts of all of the matters considered and decided by the agency, which would very substantially increase the complexity and costs of judicial review and the time required to complete it. Moreover, because the decisions of a federal agency with national jurisdiction may be reviewed in 11 different federal courts of appeals, there would be a far greater likelihood of conflicting judicial opinions if each court were free simply to substitute its own policy judgments and factual determinations for the agencies. This would greatly reduce uniformity and certainty in the regulatory process, as well as adding to the burdens of the Supreme Court, which would have to resolve such conflicts.

Again, I appreciate this opportunity to share the Commission's views on regulatory reform issues with you and the Committee. If I can be of any further assistance, please let me know.

Sincerely yours,

Reese H. Taylor, Jr.

Reese H. Taylor, Jr.
Chairman

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

SEP 14 1981

The Honorable William V. Roth, Jr., Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

By letter dated May 14, 1981, you requested the views of the Nuclear Regulatory Commission on S. 1080. In addition, your letter of July 30, 1981 sought the Commission's views on the particular portion of that bill, Section 624. That Section would give the President or his designee authority: (a) to establish procedures for agency compliance with the bill's requirements for a regulatory analysis for major rules, and (b) to monitor, review, and ensure agency implementation of those procedures.

The Commission supports the purposes and objectives of the bill's requirement for preparation of a regulatory analysis for major rules subject to the specific comments that follow in this letter. The agency currently has procedures for preparation of a value-impact analysis for rulemaking actions. This analysis is essentially a cost-benefit study designed to help the agency make more informed judgments.

The Commission intends to conduct a study to determine what particular changes, consistent with law, might bring current agency procedures more into line with President Reagan's recently promulgated Executive Order 12291 on this general subject.

We share the Congressional concern, as indicated by S. 1080, that agencies better understand the economic costs imposed by regulatory requirements.

The Commission notes that S. 1080 requires an agency to adopt the most cost-effective alternative unless its statute directs otherwise. While the language of the NRC's organic statutes is not explicit, the Commission has consistently interpreted the intent of Congress to be that considerations of public health and safety are paramount. The Commission does not interpret S. 1080 to reverse this paramount role. If our understanding is in error, we request your clarification.

With regard to the Executive Branch oversight of a Congressionally imposed regulatory analysis requirement, we believe that allowing the President or his designee to interpose themselves directly into the agency's regulatory procedures can only weaken, and perhaps ultimately destroy, the independence that Congress intended for NRC. Cooperation between the Executive Branch officials and independent agencies is to be encouraged; nonetheless, S. 1080 goes beyond simply fostering cooperation. Indeed, it provides the opportunity for direct intervention in, and partial control of, an aspect of agency rulemaking. The framework established by Congress to guarantee that the decisionmaking processes of independent agencies are free from undue influence by the Executive Branch officials and entities, as well as the unique relationship between Congress and the independent agencies, could be eroded by this provision.

In the event your committee considers it necessary to provide for the Executive Branch oversight, we believe you should also consider the following clarifications and additions to the bill. First, the Executive Branch review should generally be confined to the period after the notice of proposed rulemaking is published. Prenotice submission of an independent agency's proposed regulation or corresponding regulatory analysis unnecessarily risks undue Executive Branch influence of the agency's decisionmaking. Second, it should be made clear that the authority of the President or his designee is limited to a determination whether the agency correctly decided that a rule is, or is not, "major" and has followed the procedural requirements imposed in developing its regulatory analysis. The substantive conclusion reached in any cost-benefit analysis should not be a proper subject for the Executive Branch review.

In addition, we are concerned that the bill's grant of authority to the President or his designee to identify rules as major and to amend an independent agency's schedule for the timing of a rule's review would provide the Executive Branch unnecessarily wide latitude in establishing the priorities of the NRC's review process. We urge that such executive authority be eliminated from the bill.

Finally, we would also like to comment on the bill's requirements in section 553(f)(2) relating to the use of information in rulemakings that is otherwise exempt from disclosure under the Freedom of Information Act (FOIA). NRC's authority in several areas, including those concerning physical security and safeguards accounting for special nuclear materials, involves the agency in rulemaking actions that necessarily are based on classified, confidential, or proprietary information that would otherwise be exempt from public disclosure under FOIA. To the extent the NRC has been given the responsibility in areas that necessarily require the agency to consider sensitive information that Congress previously has determined should be exempt from disclosure, e.g., 47 U.S.C. § 2167 (special nuclear material safeguards information exempt from FOIA disclosure), the goal of effective regulation is not served by now requiring even partial disclosure, in the form of a sanitized summary, as S. 1080 would require.

Thank you for this opportunity to provide the Commission's views on S. 1080.

Sincerely,

Nunzio J Palladino

Nunzio J. Palladino

cc: Sen. Thomas F. Eagleton

POSTAL RATE COMMISSION
Washington, D.C. 20268

Janet D. Steiger
ACTING CHAIR

AUG 31 1981

August 25, 1981

The Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Chairman Roth:

This letter is in response to your request of July 30, 1981, for our comments on S. 1080, the Regulatory Reform Act, as reported by the Committee on the Judiciary. You asked us to address those provisions of S. 1080 as reported which would allow the President considerable oversight powers with respect to major rulemakings.

Section 621 of the bill allows the agency or the President to designate certain rules or groups of rules which the agency intends to enact as "major" -- either because they are likely to affect the economy to the extent of $100 million or more annually in "direct or indirect enforcement and compliance costs" or because they are likely to result in (a) substantial increases in costs for identified groups [§ 621(3)(B)(i)]; (b) significant adverse effects on other economic factors such as competition, investment, public safety, etc. [§ 621(3)(B)(ii)]; or (c) other effects warranting a regulatory analysis. A major rule must be preceded by a regulatory analysis, and the President is empowered by § 624 of the bill to set up machinery for enforcing these requirements on all agencies.

As your letter observes, these provisions would apply equally to the cabinet departments and agencies which are in any event subject to direct Presidential supervision and to the independent regulatory commissions.

This fact could create additional controversy surrounding the legislation and it is clearly a matter which the Committee will need to examine with care. Apart from the general question whether the independence of these commissions is inappropriately curtailed by the provisions of §§ 621-624, we believe it would be worthwhile examining whether the function of a regulatory analysis is not in fact served at least as well by a regulatory agency's narrative opinion. It is true that these opinions have sometimes been found by the courts to be less than fully explanatory of what the agency has done and how it has reasoned; in general, judicial reversal and an order to the agency to prepare adequate findings are the result when that happens. See, e.g., USV Pharmaceutical Corp. v. Secretary of HEW, 466 F.2d 455 (D.C. Cir. 1972); WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969). We believe, however, that this issue is really a special case of a broader one: whether the work characteristically done by the independent regulatory agencies is well suited to the treatment described in §§ 621-624.

While it is certainly not the exclusive activity of the independent regulatory agencies, the determination of cases involving individual persons or firms and their rates, services, classifications, facilities, etc., constitutes a very large portion of their dockets. Historically, rate-making and licensing for particular entities have been treated differently from rulemakings of general applicability. Indeed, the safeguarding of individual concerns' rights in the process of making such decisions is one of the values served by the quasi-judicial independence of these agencies. As the Supreme Court said of the Federal Trade Commission,

> The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts "appointed by law and informed by experience."

Humphrey's Executor v. United States, 295 U.S. 602, 624 (1935). It was on this basis that the court held the tenure of a member of the FTC independent of the President's will, absent statutorily specified cause for his removal.

The thrust of §§ 621-624 of S. 1080 is to establish, in the case of major rulemakings, Presidential monitoring and clearance in advance of agency action. "Rules," for this purpose, are as defined in 5 U.S.C. § 551; that is, they include

> . . . the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

These traditional and characteristic public-utility regulation matters would therefore, presumably, be subject to the new procedures.

That there is a certain hesitancy (justifiable, in our view) to treat these highly judicialized cases in the same manner as the more nearly legislative rules issued by more purely executive agencies is indicated by § 621(3)(A)(ii) of S. 1080. That provision declares that a rule having an annual effect of over $100 million is a "major" rule, but excepts from the "major" category

> (a) a rule of particular applicability that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate, or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing . . . ; or
>
> (b) a rule that authorizes the introduction into commerce or recognizes the marketable status of a product or service that, pursuant to statute, could not lawfully be introduced into commerce or marketed in the absence of the rule[.]

We believe this provision summarizes quite adequately that category of decisions which have traditionally been accorded the maximum of quasi-judicial protections in the administrative process (including freedom from determinations by the executive of the result desired on policy grounds). It is quite true that the independent regulatory agencies are sometimes called upon to carry out the policy of the executive, especially through the use of truly legislative rulemaking. To the extent that they do so through rules of general rather than particular applicability, the mechanisms established by §§ 621-624 seem reasonably well adapted to improve the process.

We assume, therefore, that it is the intent of § 621(3) as a whole to exclude from the definition of major rule the two categories described in subsections (3)(A)(ii), even though -- if one follows literally the numeration of the section -- it might seem that they are not excluded from the second branch of the definition [subsection (3)(B)]. For the reasons we have suggested, this seems to be the logical reading; it is not apparent why these types of decisions would be excluded from the process when they simply implied an effect of more than $100 million, but not when they arguably met the looser criteria of subsection (3)(B). Grammatically, too, it would seem that the phrasing of subsection (3)(A) conveys the intention that the two described categories of rules are never to be considered "major." Subsection (3) defines "major rule," and subparagraph (ii) states without qualification that "major rule" "does not mean [either of the two particular categories next described]."

On the other hand, if it is not considered clear that this is the intent of the provision, we would suggest that the various parts of the definition be rearrangd so as to make it clear. We consider this important, because it would -- if made entirely clear -- help to resolve some of the doubts that have been expressed regarding the propriety of subjecting independent regulatory agencies to the Presidential review process laid out in the bill. As noted above, it is sometimes necessary and desirable to employ one of the independent commissions to carry out policies decided upon by the political branches of government, as well as to act in a quasi-judicial mode to decide individual cases under the regulatory statute. If the former type of activity is assigned to an independent agency (always assuming that such an assignment is proper under its enabling legislation), then it is hard to see how the Presidential review described in S. 1080 could be objected to. On the other hand, if it is not clear that such review before the agency issues its decision is not contemplated in the ratemaking area and other fields of regulatory effort characterized by decisions affecting particular parties, the doubts expressed by observers concerned with the traditional independence of the regulatory commissions would have considerable logical foundation.

In short, it seems to us that by focusing on the particular agency activity -- rather than on the type of agency -- a more realistic view can be gained of the degree to which S. 1080 would disturb existing patterns of administration or potentially prejudice the "consumers" of regulatory decisions.

Accordingly, we believe it should be made as clear as possible, through the explanatory report of the Committee if S. 1080 is reported out, or even through amendment if that is deemed necessary, that the executive oversight provisions of §§ 621 *et seq*. are not intended to apply to ratemaking and similar activities of independent regulatory agencies, but rather to their substantive rulemakings engaged in as part of the carrying out of a politically determined policy. The same problem does not exist in the case of cabinet departments, since they can be thought of as entirely engaged in either rulemaking of the latter sort, for which Presidential review is appropriate, or in adjudication, to which S. 1080 would not apply.

Time has not permitted us to obtain the advice of the Office of Management and Budget as to consistency with the President's program. We are therefore submitting copies of this letter to OMB and will furnish you with copies of any comments received from it.

These comments have, as your letter requested, focused entirely on the executive oversight provisions of S. 1080. If we can supply any further information, please let us know.

Sincerely yours,

Janet D. Steiger
Acting Chair

STATEMENT OF THE AMERICAN COUNCIL OF LIFE INSURANCE

This statement is submitted on behalf of the American Council of Life Insurance. The Council represents over 500 life insurance companies which account for 95 percent of the life insurance in force in the United States, 99 percent of the reserves for insured pension plans, and 97 percent of the assets of all life insurance companies.

The regulatory history of the insurance business is unlike that of any other major sector of the American economy. Historically, the business of insurance has been the subject of state regulation and taxation. Indeed, in 1944, when the Supreme Court reversed itself and found otherwise, Congress quickly responded by the enactment of the McCarran-Ferguson Act. That Act declares that the continued regulation and taxation of the business of insurance by the states is in the public interest. Furthermore, under McCarran, no federal regulatory agency may assert jurisdictional authority over the business of insurance where the states have regulated.

The American Council of Life Insurance thus speaks for a business which is regulated primarily by the states and which believes that continuance of state regulation is clearly in the best interests of the public. But, in the 36 years since the enactment of the McCarran Act, there has, unfortunately, been an increased tendency toward more federal involvement in the insurance business.

Federal involvement in the life insurance business has been largely a consequence of the federal government's role as an economic and social planner, as administrator of federal health and economic security programs, and as legislative "watch dog" over the McCarran Act. Such a role has adversely affected the general economics and social environment in which our business operates in such specific areas as inflation, taxation, savings and investment, unemployment, and welfare programs. Numerous federal regulatory agencies and statutes affect the operation of each life insurance company as a business, as an investor, and as an employer. The impact of federal activities is felt on our markets, our products, the competitive environment in which we do business, and the type and amount of information we are required to supply. The resulting super-imposition upon state regulation of a layer of fragmented, often duplicative, federal regulation has created confusion and costs of compliance far in excess of the benefits to policyholders already protected by intensive state regulation.

Thus, the life insurance industry has incrementally been subjected to a form of dual regulation; that is, both the federal and state government exercise authority over our business.

In testimony before the Senate Finance Committee on May 19 of this year, the American Council of Life Insurance has already expressed its support of many of the economic policy initiatives being considered by the Congress, particularly those to eliminate counterproductive regulatory measures. We expressed that support in the belief, shared by most of those who have already commented on this legislation, that overly burdensome or unnecessary Federal regulation contributes substantially to inflation--our business' Public Enemy No. 1. We reaffirm that support now in urging favorable consideration of the proposed Regulatory Reform Act.

We do wish to be understood, however, as being fully committed to the regulatory process at the appropriate level, when essential to serving critical public needs. No business that has the financial stake that we have, as writers of life, accident and health, and disability insurance, can find acceptable the use of regulatory reform tools to sweep away reasonable rules that today save lives, prevent accidents and disease, and help promote health and safety in the home, in the workplace, and on the highways.

Cost-Benefit Analysis in Rule-Making. In our view, it is imperative that the steps already taken by the Administration to help improve the quality of agency rule making be supported by Congressional action. Such action would bring the disciplines of sharper cost-benefit analysis to bear on agencies not clearly subject to directives of the Executive Branch.

We particularly favor the provisions of S. 1080 concerning the detailed requirements on the establishment and maintenance of the public file in each proceeding, which would include or identify studies and other documentary material on which the agency is relying in formulating proposed rules. Our business, unlike those regulated comprehensively at the Federal level, is not one which is well understood by any single Federal agency.

No Federal agency collects and maintains information about our business comparable to what is available and familiar to state insurance departments. In some Federal proceedings, we often find it frustrating to proceed in open-ended fashion against undisclosed selective data, poor data, or outdated data, whose thrust and importance in the agency's eyes will be made explicit only on final agency action.

In addition, in major rule-making, the opportunity to make oral presentations, including an opportunity for cross-examination, can be critical in sharpening and helping to resolve issues of fact central to the asserted need for regulation, the range of alternatives which might be considered, and the ultimate form which final rules may take.

Judicial Review. We are also strongly in favor of Section 5 of the bill, which would amend the judicial review provisions of the Administrative Procedure Act to incorporate what has come to be known as the Bumpers Amendment. That amendment would prohibit federal courts from presuming that agency interpretations of a law are valid, and would also require agency factual determinations in rule-making to have substantial support. Careful agency rule-making, exercised with fidelity to Congressional intent, as best as that can be ascertained and given effect, has no need of presumptions in the agency's favor.

Periodic Regulatory Reviews. We are also supportive of the concepts incorporated in section 4 of S. 1080, which would require periodic wholesale reviews of major rules at the Federal level.

Such a review would provide a salutary check on the perpetuation of unnecessary or outdated regulations.

Ideally, Congressional committees should exercise continual oversight responsibility for not only the statutory programs under their jurisdiction, but also major rules adopted under each of these programs. However, as a practical matter, other priorities often interfere with the best of plans to engage in systematic reviews of this kind. S. 1080, at least, imposes on the agencies themselves the obligation of periodic review. In many instances, we think that the process will highlight problems which may require Congressional attention or reevaluation by the Executive Branch.

In conclusion, we wish to commend the Chairman and members of the Subcommittee, as well as the other Senators who are now co-sponsoring S. 1080, for their fundamental recognition that agency procedural reform is long overdue.

S. 1080, if enacted, will play a vital role in assuring the continuation of other reform efforts presently underway. We are confident that from all the scrutiny that is being brought to bear on administrative agency law and practice, there can emerge a healthy balance between the pursuit of economic revitalization and growth and the overlay of social control necessary to protect the health, safety and well-being of Americans in the overall public interest.

We stand ready to assist the Members of the Subcommittee and its staff concerning any further information regarding our views on S. 1080.

STATEMENT OF
THE AMERICAN GAS ASSOCIATION
BEFORE THE
COMMITTEE ON GOVERNMENTAL AFFAIRS
U.S. SENATE
ON S. 1080
(LAXALT, R-NV)
THE "REGULATORY REFORM ACT"
AND ON
S. 344
(LEVIN, D-MICH; BOREN, D-OK)
THE "AGENCY ACCOUNTABILITY ACT OF 1981"
June 30, 1981

Introduction:

The American Gas Association (A.G.A.) submits the following statement on S. 1080 (Laxalt, R-NV), the "Regulatory Reform Act" and on S. 344 (Levin, D-MICH; Boren, D-OK), the "Agency Accountability Act of 1981." A.G.A. is a national trade association representing nearly 300 natural gas transmission and distribution companies serving over 160 million consumers in all 50 states. A.G.A. member companies account for nearly 85% of the nation's total annual gas utility sales.

Regulatory reform is an issue in which the natural gas industry is extremely interested because of the extent to which the industry is regulated at all levels of government. For example, the siting, construction, and licensing of major new energy facilities are governed by several federal agencies as well as state and local governments. Importation of natural gas is governed by the Federal Energy Regulatory Commission (FERC) and by the Economic Regulatory Administration (ERA) within the Department of Energy (DOE). Furthermore, pipeline curtailments are governed jointly by FERC and ERA. Pipeline safety is subject to regulation by both the Department of Transportation (DOT) and by the Occupational Safety and Health Administration (OSHA). Finally, there is a myriad of federal regulations governing the energy conservation activities of local distribution (utility) companies. For these reasons, the natural gas industry is keenly interested in any legislation which affects the regulatory process.

A.G.A.'s statement will focus upon the following crucial issues:

A. S. 1080's Omnibus Approach

- While A.G.A. concedes that there are many improvements which could be made in the regulatory process, we are convinced that the omnibus approach taken by this legislation will serve only to further retard the promulgation of well-reasoned regulations. Cost-effective regulation can only be adopted if the regulators perform a meaningful cost-benefit analysis of regulatory proposals. Executive Order 12291 on Federal Regulation[1] will require that all federal agencies (other than independent agencies) adopt major rules consistent with a cost-benefit analysis which establishes that the rule will have the least net cost to society.[2] A.G.A. believes that the Executive Order should be given an opportunity to work prior to any further congressional consideration of proposals to require all agencies to adopt the cost-benefit approach.

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[1] 46 Fed. Reg. 13193; February 19, 1981.

B. Specific Concerns with S. 1080

- The regulatory analysis required by proposed Section 3 for major rules should be revised to adopt the "least net cost to society" requirement contained in Executive Order 12291.[3]

- While A.G.A. believes that major rules should be reviewed periodically for the purpose of determining whether they are still cost-effective, we do not believe that such rules should be reviewed automatically on an arbitrary 10 year review cycle. It is possible that the need for some major rules may be obviated prior to the expiration of a 10 year period; furthermore, it is possible that some rules may continue their usefulness for far longer than 10 years. Consequently, A.G.A. believes that no time limit should be set for agency review of major rules, leaving this determination to the agencies having expertise and implementation responsibility for major rules.

- A.G.A. opposes the amendments to the Administrative Procedure Act (APA)[4] contained in Section 5 which relate to the APA scope of review provisions.[5] Specifically, this bill would alter the presumption of validity presently afforded to agency rules by instructing the reviewing court not to accord any presumption for or against agency action. A.G.A. opposes this approach, since agencies should be recognized as having significant expertise regarding the subject matter of their agency action.

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[2] Id., §2(d).

[3] Id.

[4] 5 U.S.C. §500.

[5] Id., §706.

- The provisions for preparation and publication of regulatory agendas and the calendar of federal regulations in proposed Section 561 will not accomplish any meaningful regulatory reform. Furthermore, it would appear that this provision would necessitate -- at a time when we are concerned with reducing the size of the federal bureaucracy -- the establishment of a staff within each agency to deal with the requirements of this legislation, including regulatory analyses, regulatory agendas and other matters of planning and management. For this reason, A.G.A. opposes the provisions for publication of regulatory agendas and the regulatory calendar required of the President.

C. Specific Concerns with S. 344

- A.G.A. opposes the legislative veto provisions contained in S. 344. Legislative review of major rulemakings will only serve to slow down an already cumbersome administrative process. Congress can solve any concerns it has with agency rulemaking by drafting enabling legislation which gives agencies adequate guidance in the promulgation of rules. While a legislative veto might be an appropriate mechanism in certain specific and limited regulatory applications, A.G.A. does not believe this mechanism is well-suited for across-the-board application to the regulatory process.

- A.G.A. opposes the S. 344 definition of "significant rule" in Section 7(d), as it provides little guidance for agencies in the determination as to whether a rule is of enough importance to be subjected to the legislative veto process. Because we oppose a generic legislative veto, A.G.A. believes that any application of this mechanism should be done on a limited basis. This can be accomplished by requiring that only major rules, as defined under E.O. 12291, be subject to the legislative veto.

A. S. 1080's Omnibus Approach

As with regulatory reform proposals in the last Congress, this bill is predicated on the premise that a comprehensive legislative solution is desirable to cure the regulatory problems which exist in the more than 90 federal regulatory agencies. A.G.A. does not, however, accept this premise. Each of these agencies has a specific statutory mandate and a specific area of jurisdiction. Furthermore, the persons and industries which are regulated by these agencies differ vastly from agency to agency. Consequently, A.G.A. is convinced that regulatory reform cannot be achieved in a meaningful manner unless each agency is reviewed from the standpoint of its statutory mandate and from the standpoint of the regulatory framework within which it works.

While there may be problems common to many of the federal agencies, A.G.A believes that the best way to achieve regulatory reform will be for Congress to identify and solve regulatory problems on an individual basis, proceeding as necessary with remedial legislation.

An omnibus approach to regulatory reform obscures the real source of the regulatory problems to which this legislation is addressed. A.G.A. is convinced that one key source of poor regulation is the body with responsibility for providing agencies with their statutory mandates -- the United States Congress. Many times, it appears to be politically expedient to adopt vague statutes granting agencies ill-defined mandates to go forth and regulate. Unfortunately, the typical agency response to vague statutory directives is to go forth and regulate, and regulate, and regulate.

One example of ill-defined statutory directives can be seen in the Federal Trade Commission Act[6], which requires the FTC to direct its attention to "unfair methods of competition . . . and unfair or deceptive acts or practices . . . ."[7] These vague directives have spawned numerous judicial interpretations and have led Congress to reexamine the FTC Act and the manner in which this agency pursues its statutory mandate. While it is difficult to foresee all of the possible regulatory implications at the time Congress considers organic statutes, A.G.A. believes that Congress would save a substantial amount of regulatory and judicial time if it would carefully consider the problems it wants the agency to resolve and carefully define them in the generic legislation. The most effective way to streamline agency procedures is to provide clear guidance to the agency as to what its regulatory purpose is. It would then be much easier to bring a successful judicial challenge to regulations which exceed the statutory mandate. This would also permit the three branches of government -- legislative, executive and judicial -- to function effectively within their respective spheres of responsibility.

Realistic regulatory reform cannot be accomplished by applying a simple solution to a complex regulatory problem. In analyzing the regulatory reform proposals which were considered by the last Congress, one observer wrote:

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[6] 15 U.S.C. §41.

[7] *Id.*, at §45.

> The underlying problem with the [current] proposals is that they have all proceeded as if the current regulatory malaise has one single cause. But the problems of the administrative process are many; most are peculiar to a specific agency or subject. Even where general principles or common threads seem identifiable, their application will vary and they must be tailored to the particular problem at hand.[8]

A.G.A. believes that Congressional attention should be directed to the statutory mandates governing each federal agency and the manner in which that agency has fulfilled the requirements of the organic legislation. To the extent Congress finds that there are problems, either in the legislation itself or in the manner in which the legislation is being implemented, Congress should address these problems on an agency by agency basis. Unfortunately, an omnibus approach, such as S. 1080, is simplistic and will not lead to meaningful regulatory reform. It also is important that Congress exercise careful oversight regarding agencies' management of their rulemakings and regulatory caseloads. Agencies should report periodically on the number of rules and cases pending and those which have not been resolved. Congress should satisfy itself that agencies are using efficient regulatory and caseload management techniques.

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[8] Gellhorn, Ernest, Reform as Totem - A Skeptical View, 3 REGULATION: AEI JOURNAL ON GOVERNMENT AND SOCIETY 23 (May/June 1979), at 29.

Instead of adopting an omnibus legislative measure at present, Congress should allow sufficient time to gain experience under E.O. 12291 before it enacts into legislation an untried approach. We realize that the effective date provided in Section 8(a) for the regulatory analysis provisions is January 1, 1983, and that some may argue that the period before this date should provide for adequate experience with E.O. 12291. However, enacting legislation without first assessing the impact of E.O. 12291 on the regulatory process could be an expensive experiment and could prove to be a regrettable waste of time and resources. Furthermore, Congress would be prejudging the issue if it enacted this legislation while asserting that the January 1, 1983, effective date will provide the agencies needed experience with the Executive Order.

The remainder of our statement will focus on the specific problems we have with S. 1080.

B. Specific Problems with S. 1080

- Regulatory Analysis

Section 3 of S. 1080 would amend the APA to require -- in essence -- that regulatory analyses of major rules be prepared and summarized in the notice of proposed rulemaking published in the *Federal Register*. The definition of "major rule" contained in proposed Section 551(16) is similar to the definition for "major rule" contained in Section 1(b) of the President's Executive Order.[9] We agree with both of these definitions since they call for an assessment of the proposed rule's effects at all levels and for "nonquantifiable" effects. However, we are concerned that this provision would not reserve any discretion with the agency to include in this definition a rule which the agency otherwise determines will have a major impact. Consequently, we urge that this definition be amended by adding, as new §551(16)(B), the words "(B) any other rule which the agency determines will otherwise have a significant effect." (See: Exhibit I).

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[9] 46 Fed. Reg., *supra* note 1.

A.G.A. is also pleased that this bill would specifically exclude from the "major rule" definition certain rules of particular applicability respecting rates, prices, facilities, services, corporate or financial structures and other case-specific matters. These matters are generally dealt with under current Section 551(4) of the APA, and we believe that this definition of "major rule" will prevent the misapplication of inappropriate procedures to such specific proceedings as rate proceedings.

With regard to the §553 amendments, A.G.A. believes that the provisions of E.O. 12291 will provide for a thorough regulatory analysis and will provide for more thorough review of the analysis (as a basis for agency action) than will the provisions of S. 1080. For example, E.O. 12291 requires that all agency action, including major rules, be adopted at the least net societal cost. There is no such requirement of agency action in S. 1080. Under the Executive Order, if the agency chooses not to adopt an alternative approach which would achieve the same regulatory goal at a lower cost, the agency must provide a cost benefit analysis of that alternative and a brief explanation as to why that alternative legally could not have been adopted.[10] S. 1080 does not require such a strict showing and merely requires that the alternative chosen ". . . will substantially achieve the rulemaking objectives in a more cost effective manner than the alternatives to the proposed rule."[11] A.G.A. believes that the E.O. 12291 approach will force agencies to consider only legally feasible alternatives in their regulatory analyses. In our experience, it has not been uncommon for an agency to describe several "alternatives" to the approach taken in the rulemaking, none of which were legally (or technically) feasible. By following this approach, the agency leads the reader to the "inescapable" conclusion that the approach taken in the proposed rule is the only one which could have been taken.

Most recently, A.G.A. filed extensive written comments in a rulemaking before DOE[12] in which the proposed draft regulatory analysis described four "strawmen" as alternative regulatory approaches which they could not have followed legally. The proposed rule was, in A.G.A.'s opinion, a substantial deviation from the statutory directives given to DOE, and, in our written comments in that docket, we pointed out several approaches DOE could have taken to comply with the statute. As Exhibit II to our statement, we are attaching a copy of A.G.A.'s Critique of the Draft Regulatory Analysis in question. We believe that this Critique illustrates the fact that, unless specifically ordered to do so, agencies may not consider regulatory alternatives which are legally and technically feasible. We believe that E.O. 12291 will accomplish this objective; however, we are concerned that S. 1080, as written, may not provide agencies with a strong enough directive that they must consider legally and technically feasible alternatives in their regulatory analyses.

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[10] 46 Fed. Reg., supra note 1, at §3(d)(4).

[11] S. 1080, §3 [proposed §553(c)(2)(D)].

[12] The Proposed Rule to which we refer would implement certain changes in the National Energy Conservation Policy Act (Pub. L. 95-619; 92 Stat. 3206; 42 U.S.C. §8201; NECPA) by the Energy Security Act (Pub. L. 96-294; 94 Stat. 611; 42 U.S.C. §8211). The Proposed Rule would expand the Residential Conservation Service (RCS) Program to individually heated or cooled multifamily residential buildings and would establish the Commercial and Apartment Conservation Service (CACS) Program -- similar to RCS -- for non-RCS multifamily residential buildings and small commercial buildings. See: 46 Fed. Reg. 4482; January 16, 1981.

- Ten Year Review of Major Rules

While A.G.A. agrees that agencies should periodically review their existing rules (particularly major rules), we are concerned that the provisions of proposed §561 could lead to a more frequent review than every ten years. Proposed Sections 560(a)(4) and (b)(1) state that:

> (a)(4) Except where explicitly provided otherwise by statute or where an extension has been granted pursuant to subsection (f), each major rule that is in effect on the date of enactment of this

> section shall be reviewed by the agency within 10 years of the date of enactment of this section. Pursuant to such review, the agency shall determine to renew, amend, or rescind that rule.
>
> (b)(1) Except where explicitly provided otherwise by statute or where an extension has been granted pursuant to subsection (f), each major rule promulgated, amended, or otherwise renewed by an agency after the date of enactment of this section shall be reviewed by the agency within 10 years of the date on which such a rule becomes effective. Pursuant to such review, the agency shall determine to renew, amend, or rescind that rule.

Existing major rules are to be reviewed within a ten year period as well. A.G.A. is concerned that these provisions will permit major rules to be reviewed more frequently than every ten years. Considering that many major rulemakings can take from two to five years to complete, a ten year review cycle may not be sufficient to allow the rule to operate (and establish a track record). Consequently, we urge that the foregoing provision be amended by deleting the underlined words and inserting in lieu thereof "at least ten years after."

While A.G.A. believes that major rules should be reviewed periodically for the purpose of determining whether they are still cost-effective, we do not believe that such rules should be reviewed automatically on an arbitrary ten year review cycle. It is possible that the need for some major rules may be obviated prior to the expiration of a ten year period; furthermore, it is possible that some rules may continue their usefulness for far longer than ten years. Consequently, A.G.A. believes that no time limit should be set for agency review of major rules, leaving this determination to the agencies having expertise and implementation responsibility for major rules.

Finally, we emphasize that requiring an agency to set a date for review of a major rule is not the same as requiring that agency to *complete* its review of a major rule by that date. This point is crucial in view of proposed Section 560(a)(1) which requires that each agency schedule rules for review and set a review date ". . . within a ten-year period." If one intends that review of a major rule must be completed in ten years, the review of the major rule would have to begin substantially prior to the tenth year. We do not believe that Congress intends such a result. Consequently, A.G.A. urges that this provision be amended to delete the words "within a ten year period beginning on the effective date of this section." Furthermore, proposed section 560(a)(2) should be revised so that it is clear that *completion* of agency review may occur *after* the ten year review date. We believe that this provision will allow agencies maximum flexibility in reviewing major rules and will ensure that major rules are reviewed.

- Proposed Amendment to the Scope of Judicial Review (APA Section 706)

Section 5 of S. 1080 would amend the APA to alter significantly the reviewing court's scope of review of agency action. It would provide that "In making determinations on questions of law, the court shall not accord any presumption in favor of or against agency action." A.G.A. believes that agency expertise must be recognized by reviewing courts, if for no other reason than to assure expeditious consideration of agency action on appeal. To do otherwise might result in the matter under review being argued *de novo* before the reviewing court. As long as the agency action must be supported by the record, viewed as a whole,[13] A.G.A. sincerely believes that the presumption of validity presently afforded to agency actions should be maintained. Reviewing courts simply do not have the time or the expertise to assess agency actions under any other scope.

- Regulatory Agendas and the Calendar of Federal Regulations

Proposed Section 561(a) largely duplicates the provisions of E.O. 12291 by requiring each agency to publish a regulatory agenda (including the major rules which will be proposed or promulgated) in April and October of each year. We do not believe that the publication of a regulatory agenda will in any way expedite agency action. In fact, to the extent that existing staff must devote significant time to the development and updating of regulatory agendas, this provision could impede the regulatory process. Thus, A.G.A. does not believe that this provision will accomplish any meaningful regulatory reform.

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[13] Section 5 (amending APA §706) would not affect the reviewing court's responsibility to examine the record of the agency's hearing.

The provision for a calendar of federal regulations in proposed Section 561(b) is repetitive of the regulatory agenda requirements and would also be published in the Federal Register in May and November of each year. This publication would require a substantial expenditure of executive branch staff time and federal funds. Furthermore, there is no "penalty" if the President or the agencies fail to comply. Thus, this provision appears to be unnecessary and should be deleted. This provision would only contribute to regulatory delay by requiring a substantial amount of staff time to prepare the agenda and calendar submissions and would not expedite rulemaking in any manner.

S. 344 has a similar provision requiring each agency to publish a regulatory agenda each six months. The major difference is that S. 344 also requires that any proposed or final significant rule must be forwarded to Congress. While the purpose of having significant rules submitted to Congress is clear -- to trigger the legislative veto mechanism -- the purpose with regard to proposed significant rules is not as obvious. In fact, we can think of no good reason to require that proposed significant rules be submitted to Congress. Consequently, we urge that this provision -- Section 3(b) -- be deleted from S. 344.

Despite our opposition to much of S. 1080, we are as concerned with the failure of agencies to complete rulemaking proceedings expeditiously as is Congress. Thus, we support the approach of proposed Section 561(a)(3) in requiring agencies to establish deadlines within which they will complete rulemakings.

C. Specific Concerns with S. 344

- Legislative Veto

A.G.A. opposes the application of a legislative veto to all agencies as provided in S. 344. While the legislative veto may have application in some specific and limited instances,[14] we do not believe it appropriate to require all rules to be submitted to Congress for review. Legislative review of major rulemakings will only serve to further encumber an already cumbersome process.

When Congress fails to give an agency specific guidance in enabling legislation, the result is an inappropriate delegation of legislative authority to an administrative agency. By adopting an across-the-board legislative veto, Congress is saying -- in essence -- it cannot make a decision on a specific subject in the first instance. Therefore, Congress abdicates its primary decisionmaking responsibilities in favor of a "second-look" via the legislative veto mechanism. While we take no general position on the constitutionality of legislative vetoes, we believe that Congress must be aware that an across-the-board legislative veto will be challenged, and its efficacy will be determined by the courts. The only result will be further delay in the regulatory process.

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[14] At this time, A.G.A. is opposing a constitutional challenge to the legislative veto provision in §507 of the Natural Gas Policy Act regarding Phase II of incremental pricing (Consumer Energy Council of America v. FERC, D.C. Cir. Docket No. 80-2184 and 80-2312). This is one specific and limited instance in which we believe the legislative veto has appropriate application, because of the unusually great implications for the economy and the fact that a new type of regulation is involved.

As one observer noted:

> Another deleterious effect of the legitimation of the legislative veto will be an increase in that very practice of congressional delegation of vague and standardless rulemaking authority which has placed us in our current predicament. . . . The delusion that it would be able to control the agencies through the legislative veto will render Congress all the more ready to continue and expand the transfer of basic policy decisions to the agencies . . . . By enabling Congress to have its way -- that is, effectively to control the outcome -- without affirmatively accepting the responsibility in a record vote, the legislative veto is an egregious subversion of the democratic process.[15]

Thus, an omnibus legislative veto could actually increase the number of unreasonable major rules and expand the effective authority of federal agencies. Consequently, A.G.A. is convinced that an omnibus legislative veto provision is ill-advised and would not solve any of the problems with the regulatory process which have prompted the approaches taken by this legislation.

One specific problem we have with S. 344's legislative veto provision is Section 6 which provides that Congressional inaction regarding or rejecting the joint disapproval resolution is not to be deemed an approval of the regulation. This subsection provides the strongest argument in favor of deleting the comprehensive legislative veto: Why should Congress be involved at all if its only involvement is to veto regulations? This provision abrogates the entire philosophy behind a generic legislative veto. In order to make a decision as to how to vote on the regulation, Congress must review the entire rulemaking file. If review by Congress is to be meaningful at all, then its failure to take the affirmative action of vetoing the rule must be deemed a Congressional affirmation of the rule's statutory integrity. Section 6 also creates confusion as to how Congressional intent is to be interpreted. In the case of the vast number of major rules which Congress does not veto, it will become more difficult for affected parties to mount a successful challenge in the courts. If Congress is to review rules for their statutory shortcomings, failure to veto should be viewed as an implicit approval of a rule's statutory integrity.

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[15] Scalia, The Legislative Veto: A False Remedy for System Overload, 3 REGULATION: AEI JOURNAL ON GOVERNMENT AND SOCIETY 19 (November/December 1979), at 25.

- Definition of "Significant Rule"

A.G.A. opposes the S. 344 definition of "significant rule" in Section 7(d), as it provides little guidance in the determination as to whether a rule is of such importance to be subjected to the legislative veto process. Section 7(d) merely provides that the agency consider such vague factors as ". . . the type and number of individuals, businesses, organizations, and state and local governments affected . . ." Unless this definition is amended to provide greater specificity, the type of rules Congress will review could vary greatly in terms of their effect on all sectors of the economy. Furthermore, Congressional review of "significant rules", as broadly defined, could result in an unnecessary burden to both the regulatory and legislative processes.

Consequently, A.G.A. urges that Section 7(d) be revised significantly to circumscribe Congressional review. This can be accomplished by limiting Congressional review to *major* rules. A.G.A. supports the "major rule" definition contained in Section 1(b) of Executive Order 12291 on Federal Regulation:

> (b) "Major rule" means any regulation that is likely to result in:
>
> (1) An annual effect on the economy of $100 million or more;
>
> (2) A major increase in cost or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or
>
> (3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.[16]

While A.G.A. opposes legislative vetoes generally, we urge that Congress adopt a stringent definition for major rule to circumscribe application of the legislative veto.

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[16] 46 Fed. Reg., *supra* note 1.

CONCLUSION

A.G.A. appreciates the opportunity to present our views on S. 1080 and S. 344. We sincerely urge Congress to re-examine this legislation in light of the comments we have made. A.G.A. firmly believes that an omnibus approach to regulatory reform is inappropriate and should not be viewed as a panacea for solving the problems created by a complicated and overlapping bureaucracy. Furthermore, legislative veto cannot achieve true regulatory reform but will result in burdening both the legislative and the regulatory process. True regulatory reform can only be accomplished in a meaningful way by addressing the organic statutes which have created the vague agency mandates. While we realize that this is going to be a tedious, difficult task, we believe it is an absolutely essential process. A.G.A. is willing to work with this Committee and the Congress on this matter.

EXHIBIT I

A.G.A. Proposed Amendments to S. 1080 Section 2, amending 5 U.S.C. §551

1. p. 3, l. 10 add an "or" after "markets;"
2. p. 2, l. 11, change "(B)" to "(C)"
3. p. 3, after line 10, add new §(B) as follows: "means any other rule which the agency determines will otherwise have a significant effect;"

EXHIBIT II

THE AMERICAN GAS ASSOCIATION'S CRITIQUE OF DOE'S DRAFT REGULATORY ANALYSIS FOR THE PROPOSED COMMERCIAL AND APARTMENT CONSERVATION SERVICE (CACS) PROGRAM DOCKET No. RM-80-125

INTRODUCTION

A.G.A. has reviewed the Draft Regulatory Analysis (DRA)[1] in detail and in view of the President's recent Executive Order 12291 on Federal Regulation (hereinafter the "Executive Order").[2] While we will elaborate on our reasons in our Critique, there are two basic reasons why the DRA does not support the Proposed Rule. First, the DRA fails to present sufficient data to support an analysis of the cost effectiveness of the Proposed Rule. Second, the DRA fails to assess alternative approaches -- which are both legally and technically feasible -- to the Proposed Rule case[3] and its Option 2[4].

Since the DRA purports to form the legal and technical basis for the Proposed Rule.[5] A.G.A. will discuss each Chapter of the DRA.[6] Our Critique will include a discussion of the following points:

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[1] U.S. Department of Energy, Draft Regulatory Analysis, *Expansion of the Residential Conservation Service Program to Multi-family and Small Commercial Buildings*, DOE/CS-0914, November, 1980.

[2] 46 *Fed. Reg.* 13193; February 19, 1981.

[3] DRA, *supra* note 1, at 2-17 and 3-17, 19.

[4] *Id.*, at 1-9 and 3-14.

- At several points in the DRA, the CACS Program is either referred to as the "RCS extensions program", or, from the context, the impression is given that the CACS Program is viewed as being merely an extension of the RCS Program.[7] The only aspect of the RCS Program which was affected by the legislation creating the CACS Program is the inclusion of multifamily residential buildings (not centrally heated or cooled) after January 1, 1982. The Title VII amendments[8] to the National Energy Conservation Policy Act of 1978[9] created the CACS Program for centrally heated or cooled multifamily residential buildings and small commercial buildings.
- The DRA assesses three alternative regulatory approaches to the Proposed Rule, none of which would comply with NECPA and would require legislative change. The "no-action case",[10] under which DOE would take no action pursuant to NECPA, clearly would violate the mandatory aspects of the statute; the "limited rule case"[11] would not comply with NECPA since it would not require participation by public utilities; and the "enhanced regulation case"[12] would contain mandatory

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[5] The Draft Regulatory Analysis was prepared for DOE by Union Carbide Corporation, Oak Ridge, Tennessee. While we assume that DOE intends that commenters rely on this document in analyzing the Proposed Rule, we are concerned about the "Notice" which appears inside the cover page. This Notice states that "The views and opinions of authors expressed herein do not necessarily state or reflect those of the United State Government or any agency thereof." Presumably, this statement was not intended as a disclaimer by DOE of the conclusions contained in the Draft Regulatory Analysis with which DOE seeks to support the Proposed Rule.

[6] We will discuss most Chapters separately, but will discuss Chapter 4 only inasmuch as it refers to the CACS Program as the "RCS extensions program."

[7] DRA, supra note 1, at 1-1, 4-1, 5-2.

[8] Energy Security Act; Pub. L 96-294; 94 Stat. 611; 42 U.S.C. §8211 (the "ESA").

[9] Pub. L. 95-619; 92 Stat. 3206; 42 U.S.C. §8201 ("NECPA").

[10] DRA, supra note 1, at 2-8, 2-15, 3-12, 3-15.

[11] Id., at 2-10, 2-15, 3-13, 3-16.

[12] Id., at 2-12, 2-14, 2-16, 3-15, 3-19.

requirements for state governments, utilities, and tenants and building owners, substantially exceeding the authority granted DOE by NECPA. Thus, DOE has not attempted to analyze reasonable regulatory alternatives to the Proposed Rule which would not require legislative change and which are technically and legally feasible.

- In considering the coverage of commercial buildings, the DRA lists five alternatives to defining "eligible commercial customer" for program coverage.[13] Options 3, 4, and 5 would require amending NECPA. While the DRA states that both Options 1 and 2 would comply with NECPA, only Option 2 was selected for incorporation in the Proposed Rule.[14] As we have stated in our Written Comments,[15] A G.A. believes that only Option 1 is consistent with NECPA. Nevertheless, DOE did not consider Option 1 under the no-action, limited rule and enhanced regulation cases in its cost/benefit analyses of these regulatory approaches.[16] Furthermore, Option 1 was not analyzed in the Regional Studies Chapter "due to time restrictions".[17] Consequently, we believe that Option 1 was not considered adequately in terms of selecting a building coverage Option for the Proposed Rule.

- The Urban and Community Impact Analysis (Chapter 5) is inconsistent in describing the positive aspects of the Proposed Rule[18] and the negative effects of the Proposed Rule in terms of displacing low-income tenants as a result of building improvements While the DRA describes as one benefit of the Proposed Rule a "multiplier effect" whereby improved energy efficiency forms the catalyst for urban renewal and increased economic activity, it also regards as a possible negative effect the displacement of low-income tenants by building owners as a result of building improvements. The DRA claims that such displacement is unlikely, however, because the amount of financial commitment required to enhance the building's property value would substantially exceed that involved in weatherizing the building.[20] If this is the case, the "multiplier effect" theory cannot be cited as a positive effect of the Proposed Rule, since the DRA assumes that weatherization investments would not be sufficient to significantly enhance the property value.

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[13] Id., at 1-9, 1-10, 3-14, 3-17, 3-19.

[14] Id., at 1-10.

[15] Written Comments of the American Gas Association, DOE Docket No. RM-80-125, supra.

[16] DRA, supra note 1, a 3-15, 3-16, 3-19.

[17] Id., at 11-5.

[18] Id., at 5-10.

[19] Id., at 5-11.

[20] Id.

- The DRA describes the institutional effects of the CACS Program as being a "very modest" 0.5 percent of gas utility revenues.[21] A.G.A.'s latest gas industry statistics reveal that this amount, for 1979 alone, would have been $194,735,710.[22] Such an amount will not appear to be "modest" to the state regulatory authorities who will be asked to rate-base such costs or to the shareholders of utility companies whose state regulatory authorities do not allow such amounts to be rate-based.

- The DRA does not adequately assess the CACS Program impact on gas utilities where a significant number of commercial customers will be included in the Program. The 1,000 therm/month threshold, which represents annual consumption of 1200 MMBtu, is 65% greater than the 1979 average annual gas consumption for a commercial customer -- 726.5 MMBtu.[23] The significant number of eligible commercial customers, and the fact that electric utilities have nearly three times the number of commercial customers as gas utilities,[24] will result in a greater compliance burden for gas utility companies than for electric utilities. The DRA does not analyze this disparity as its relates to potential energy savings or program costs.

- Specific program cost data are essential in assessing the CACS Program's cost effectiveness. Nevertheless, the DRA fails to document many basic assumptions and cost relationships. For example, the data provided in the DRA fail to verify the summary figures shown in Table 1-4.[25] A.G.A. has utilized certain data from the DRA in deriving a figure of $2 billion as the estimated total retrofit costs to commercial building owners and tenants.[26] However, the DRA estimates that the total audit and retrofit cost for commercial building owners and tenants through 1990 will be only $402 million.[27] Unless the DRA can be modified to explain such cost relationships, it cannot accomplish its purported objective of serving as serving serving as the technical and legal rationale for the Proposed Rule.

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[21] Id., at 6-9.

[22] Gas Facts, 1979 Data, American Gas Association (Arlington, Virginia, 1979), at 103. 1979 revenues for the gas utility industry totaled $38,947,143,000.

[23] Id., at 69.

[24] At year-end 1979, the electric utility industry had 9.4 million commercial customers compared with the gas industry's 3.4 million commercial customers. Sources: (Electric) Statistical Yearbook of Electric Utility Industry/1979, Edison Electric Institute (Washington, D.C. 1979), at 2; (Gas) Gas Facts, supra note 22, at 73.

[25] DRA, supra note 1, at 1-20.

[26] Id., Table 3-2, at 3-2, Table 10-6 at 10-25.

[27] Id., at 1-20.

The foregoing represent some of the major problems we have encountered in analyzing the DRA. Most of these problems could have been resolved had the DRA presented an adequate amount of data to support its conclusions. The following is a Chapter-by-Chapter discussion of the specific shortcomings -- both major and minor -- of the DRA. A.G.A.'s goal is to provide DOE with constructive criticism so that the DRA may be revised where necessary, thus enabling DOE to issue a final CACS rule supported by an accurate and comprehensive final regulatory impact analysis.

The Proposed Rule is a major rule as defined by Section 1(b) of Executive Order 12291, since the DRA estimates the total cost of the Program (through 1990) will be $1.703 million.[28] Consequently, Section 7(e) requires a final regulatory impact analysis of the Proposed Rule must accompany the rule in final form. Furthermore, the final regulatory impact analysis must establish that the regulatory alternative chosen for the final rule involves the least net cost to society of all the alternatives discussed.[29] We believe that the DRA does not consider adequately feasible regulatory approaches to the Proposed Rule and, therefore, it does not comply with the Executive Order.

Chapter 1: Introduction and Summary

This Chapter exhibits several tendencies toward inaccuracy which pervade the entire DRA. For example, in describing the RCS Program, the DRA implies that home heating oil suppliers are automatically covered in the RCS Program.[30] Chapter 9 ("RCS Coverage") refers to gas and oil as the same "fossil fuel".[31] However, home heating suppliers are not automatically covered and may only be included under the RCS and CACS Programs if the state governor decides to include them in these programs.[32]

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[28] DRA, supra note 1, at 1-20.

[29] Executive Order, supra note 2, Section 2(d).

Another inaccuracy in this Chapter (which also pervades the DRA) is the implication that the Energy Security Act had the effect of extending the RCS Program to cover all multifamily buildings and small commercial buildings:

> The ESA provided for certain amendments to Title II of NECPA and established a Title VII, which extended the Utility Program to small commercial buildings and multi-family dwellings with five or more units per building.[33]

The DRA tendency to refer to the CACS Program as merely an extension of the RCS Program is reflected in the Title of the document (". . . Expansion of the Residential Conservation Service. . .") and throughout Chapters 4 and 5 as well. While A.G.A. understands that these misnomers are probably the result of an effort to simplify the DRA, we are concerned that this effort has resulted in over-simplification. For example, in describing the scope of the Proposed Rule, the DRA states that the "residential and commercial sectors . . . are the targets of the Residential Conservation Service. . ."[34] Since Chapter 1 introduces and summarizes the DRA, it is essential that the information contained in this Chapter accurately portrays the CACS Program. Consequently, we suggest that this Chapter be rewritten to clarify the respective coverages of the RCS and the CACS Programs.

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[30] Id., at 1-1. The DRA states that NECPA ". . . requires that large public utilities and home heating oil suppliers provide energy audits. . ."

[31] Id., See for example, Tables 9-6, 9-7 and 9-8 at 9-7, 9-8 and 9-9.

[32] Pub. L. 95-619, as amended, supra notes 8 and 9, §§212(c)(3) and 721(c).

[33] DRA, supra note 1, at 1-1.

Some of the inaccuracies we have found in this Chapter are merely summaries of the inaccurate material contained in later Chapters on which Chapter 1 was based. Consequently, the remainder of our discussion on Chapter 1 will focus only on problems which appear _in more than one_ succeeding Chapter of the DRA _or_ which are unique to this Chapter.

Section 1.6.3 of this Chapter considers the effect a direct fee for commercial or multifamily audit costs will have on the audit response rate and on energy savings.[35] The DRA provides no data supporting its assumptions and admits that "little quantitative data is (sic) available on the effect of audit charge on audit rate."[36] Nevertheless, the DRA assumes that free audits will ". . . result in about twice the audit rate assumed in this analysis for multi-family and about two and one-half times the rate assumed for the commercial sector."[37] Furthermore, the DRA states that a free audit will result in greater energy savings and will enhance the cost effectiveness of the Program.[38] A.G.A. seriously questions these conclusions when, as the DRA admits, little quantitative data are available. A.G.A. is concerned that these conclusions will be used as a rationale for mandating free CACS audits, through DOE's federal CACS standby authority,[39] in states which elect not to participate in the CACS Program. Furthermore, CACS audits can never be "free" since the audit costs will be borne either by all ratepayers or by the utility's shareholders. Shifting the cost burden from the eligible customer to the ratepayers or utility shareholders will not enhance the CACS Program's cost-effectiveness if the Program is not inherently cost-effective.

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[34] _Id._, at 1-3.

[35] _Id._, at 1-12, 1-13 at Figure 1-3.

[36] _Id._, at 1-12.

[37] _Id._

[38] _Id._

In describing DOE's statutory authority for CACS implementation, the DRA states that NECPA "permits DOE some flexibility in applying these [mandatory energy conservation] measures and practices."[40] This statutory flexibility was exercised in the Proposed Rule in the form of establishing applicability criteria for measures, in categorizing measures either for building-specific costs/savings estimates or for generic estimates, and in requiring that any energy using activity accounting for more than 10 percent of the building's consumption be targeted by the commercial audit.[41] A.G.A.'s Written Comments have focused upon several areas of the Proposed Rule wherein we believe DOE has substantially exceeded its NECPA authority. We will not reiterate these points in this Critique unless questions of statutory interpretation affect the efficacy of the DRA's conclusions which underlie the Proposed Rule.

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[39] Pub. L. 95-619, as amended, supra notes 8 and 9, §741.

[40] DRA, supra note 1, at 1-14.

[41] Id. The DRA refers to specific provisions of the Proposed CACS Rule. A.G.A.'s Critique will discuss only those specific provisions of the Proposed Rule which contradict -- or are not supported by -- the DRA.

Chapter 2: Multi-family Buildings

A.G.A.'s major objection to the approach taken by the DRA pertains to its selection of four alternatives (including the Proposed Rule) to satisfy the mandates of NECPA. These alternatives are:

- No-action - energy conservation achieved only through existing programs and by fuel price responses;
- Limited Rule - energy conservation achieved only by non-mandatory guidelines for the CACS Program;
- The Proposed Rule, and,
- Enhanced regulation - energy conservation achieved by mandatory requirements for state governments, utilities, tenants and/or building owners.[42]

As we will discuss below, none of the foregoing alternatives will comply with NECPA.

The no-action case would depend on existing programs, including federal and state tax incentives, to conserve energy in the residential and commercial sectors. The DRA discusses energy tax credits which have been claimed since 1978 pursuant to the Energy Tax Act of 1978.[43] While the DRA's discussion is informative,[44] it does not address the question how DOE could pursue this option without violating NECPA. DOE cannot adopt the no-action case, since NECPA sets forth specific statutory responsibilities for DOE and covered utilities.

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[42] Id., at 2-8 through 2-14.

[43] Pub. L. 95-618; 92 Stat. 3174; 26 U.S.C. §101.

[44] DRA, supra note 1, at 2-9.

The limited rule approach would not require mandatory participation in the CACS Program by public utilities. Procedures for offering audits would not be specified, and there would be no specific time limitations for initiating CACS Programs at the utility level. Audit content would be discretionary, and no particular measure would be required as part of the audit. Finally, there would be no requirements for state plans.[45] While the limited rule case is obviously most attractive to public utilities, it would not comply with NECPA. Participation by public utilities in CACS Program activities is mandatory under NECPA.[46] The time limits within which a utility program must be initiated are also set forth in the statute.[47] Finally, NECPA Section 710(b)(5) lists the energy conservation measures which must be considered by the auditor in performing the CACS Program audit. While A.G.A. would prefer a limited rule case wherein public utility participation would be voluntary, we recognize that such a program would not comply with NECPA.

While the DRA does not acknowledge that the no-action and limited rule cases would not comply with NECPA, it describes the enhanced regulation case as being one which "includes some provisions beyond DOE's existing authority under NECPA and would require additional legislation."[48] For example, enhanced regulation might include mandatory requirements for state governments under the CACS Program, including specified audit rate goals and energy consumption targets which must be met each year. State requirements under this approach would be enforced by denying certain federal grants, loans, and public housing subsidies. For utilities, enhanced regulation would set targets for auditing and energy conservation, enforced by imposing taxes, denying certain federal tax deductions and credits and "other regulatory action for those utilities regulated by the Federal Energy Regulatory Commission."[49] Finally, the enhanced regulation case would impose mandatory requirements for tenants and building owners, aimed at discouraging excessive energy use:

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[45] DRA, supra note 1, at 2-10.

[46] Pub. L. 95-619, as amended, supra notes 8 and 9, §§711 and 731.

[47] Id., §731(a)(1).

[48] DRA, supra note 1, at 2-8.

> Standards would be established for nominal energy requirements for living needs and uses in excess of this amount would be subject to a Federal surcharge based on marginal national energy costs.[50]

The enhanced regulation case substantially exceeds the authority granted to DOE by NECPA.

Since none of the foregoing alternatives comply with NECPA, one would assume that the Proposed Rule would follow NECPA closely. However, as we have stated in our Written Comments, the Proposed Rule is not without its non-statutory excesses.[51] A.G.A. believes that DOE could have issued a Proposed Rule following the limited rule case, but containing the statutory provisions outlined above (*e.g.*, mandatory utility participation, mandatory time limits for program initiation and specific covered measures), in lieu of the prescriptive approach contained in the Proposed Rule. Nevertheless, we believe that the DRA has failed to adequately assess reasonable alternatives to the Proposed Rule which would be legally and technically feasible. None of the alternatives discussed in the DRA are feasible within the statutory directives in NECPA.

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[49] *Id.*, §731(a)(1).

[50] *Id.*

[51] For example, the Proposed Rule would blur the NECPA dichotomy between Title II and Title VII multifamily buildings by allowing eligible Title II (*i.e.*, RCS) customers to opt for Title VII (CACS) coverage. *Proposed* §§456.320 and 456.321.

The DRA suggested three approaches DOE could take in dealing with multifamily dwellings in Title II of NECPA.[52] First, these buildings could be incorporated in the existing RCS Program. Second, these buildings could be included in the Title VII program. Finally, the tenant could be given an option of choosing RCS or CACS Program coverage.[53] For the DRA to have considered any alternative other than treating Title II buildings and Title VII buildings separately contradicts NECPA and illustrates an obvious disregard for the discrete thermal and architectural characteristics of both building types. Nevertheless, the DRA observes that "most apartment units do not differ greatly in thermal configuration from single family houses."[54] From the standpoint of heating equipment alone, this statement is inaccurate. Furthermore, to liken apartment units to single family houses is inconsistent with the statutory approach of NECPA: commercial and residential buildings and end uses are treated differently, as their discrete natures require, in achieving national energy conservation goals.

A.G.A. has two basic problems with the cost-benefit analyses for the no-action, limited rule, proposed rule and enhanced regulation alternatives. First, the DRA provides no basis for its assumptions concerning audit response and retrofit rates. While the DRA states that "promulgation of the Proposed Rules is projected to markedly increase the rate of retrofit,"[55] this Chapter does not state -- or provide any statistical basis for speculating -- what the ultimate retrofit rate would be. Second, we are concerned that the DRA has extrapolated data from single-family residential conservation programs (e.g., the Tennessee Valley Authority Home Improvement Program) in deriving the costs and energy savings of the Proposed Rule for multifamily dwellings.[56] While the DRA provides no data to support these assumptions, we urge that the DRA use data consisting solely of information derived from studies on multifamily dwellings.

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[52] Pub. L. 95-619, as amended, supra notes 8 and 9. Title II (RCS) multifamily buildings are not centrally heated or cooled. Title VII (CACS) multifamily buildings are centrally heated or cooled.

[53] DRA, supra note 1, at 1-11.

[54] Id., at 2-2.

The DRA favors a strong state role in CACS Program implementation, since ". . .the State may significantly impact the program, its cost-effectiveness, and its resulting energy savings."[57] Furthermore, the DRA implies that states should strongly consider incorporating CACS Program costs in their utilities' rate-bases:

> By incorporating RCS (sic) costs in the utility rate-base states can provide economic incentives to utilities for conservation efforts[58]

While A.G.A. does not oppose rate-basing CACS Program costs, we are concerned that the DRA apparently considers rate-basing these costs -- instead of direct cost-recovery from the customer -- as a panacea for the many problems utilities will encounter in CACS Program implementation. A.G.A. believes that states should be encouraged to allow utilities to charge eligible customers directly for CACS Program audits, to the extent allowed under NECPA.

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[55] Id., at 2-6.

[56] Id., at 1-16 through 1-18.

[57] Id., at 2-6.

[58] Id., at 2-7.

Chapter 3: Commercial Buildings

The DRA discusses the NECPA definition of commerical building. focusing particular attention on the average monthly usage thresholds for electricity, natural gas, and other fuels.[59] In interpreting these energy consumption limits, the DRA suggests five alternative approaches, three of which (Options 3, 4 and 5) would require legislative change.[60] However, the DRA acknowledges that only Options 1 and 2 are consistent with NECPA.[61] As we have stated in our Written Comments, A.G.A believes that only Option 1 is consistent with NECPA, since it would require all energy use to fall below the energy use thresholds in order for the commercial building to be covered. The DRA strongly favors Option 2, which would extend program coverage to any commercial building in which use of any energy form falls within its respective threshold. That is, if a building uses both gas and electricity and falls within the gas threshold, while exceeding the electricity threshold, it would be deemed a covered building under this Option.

Having selected Option 2 as the favored interpretation for coverage and the Proposed Rule case, the DRA proceeds to ignore virtually all of the building Options in presenting its cost-benefit analyses for the no-action, the limited rule and the enhanced regulation cases.[62] Therefore, if one seeks to compare the cost-effectiveness of Option 1 under the limited rule case, for example, the DRA renders such analysis impossible. While we recognize that the DRA does discuss each Option in its cost-benefit analysis for the Proposed Rule case, each of the other cases should have been analyzed similarly. In fact, it is impossible to tell which building Option the DRA utilized in deriving its cost-benefit analysis for the no-action, the limited rule and the enhanced regulation cases. Since the DRA strongly supports Option 2, one can only assume that this building Option was used for these cases.

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[59] Id., at 3-1.

[60] Id., at 3-14.

[61] Id., at 1-10.

The gas utility industry finds it difficult to support any interpretation of the NECPA commercial building definition. This difficulty arises from the fact that 1,000 therms of natural gas represents over seven times the energy (on a Btu equivalent basis) of 4,000 Kwh of electricity.[63] The study to which the DRA refers[64] indicates that commercial buildings use approximately 2.5 times more electricity than gas. This study also indicates that energy used for space conditioning is approximately equally divided between gas and electric space conditioning.[65]

While we recognize that the 1,000 therm/4,000 Kwh limitations are in the statute, we believe that DOE should pursue an interpretation of these limits which would recognize the inherent disparity between these energy usage levels. For this reason, A.G.A. sincerely urges DOE to adopt the Option 1 interpretation of the commercial building definition.

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[62] Id., at 3-15 to 3-19.

[63] Gas Facts, 1979 Data, supra note 22, at 203.

[64] Jackson, J.R. and Johnson, W.S. Commercial Energy Use: A Disaggregation by Fuel, Building Type and End Use (Oak Ridge, Tennessee, Oak Ridge National Laboratories, 1978), at 84.

[65] Id.

A.G.A. is encouraged that the DRA has correctly defined an eligible commercial customer as being "the owner or tenant of a commercial building . . .to whom the public utility sells natural gas. . ."[66] As we stated in our Written Comments, DOE did not follow the NECPA definition of eligible commercial customer. DOE uses the term "provides" in lieu of "sells", thereby broadening the statutory definition considerably. A.G.A. supports this particular approach taken in the DRA and sincerely urges DOE to reevaluate the approach it has taken in Section 458.103(e) of the Proposed Rule in defining eligible commercial customer.

In discussing the small commercial sector, the DRA states that "it has determined that about 61 percent of the buildings would qualify."[67] However, this statement is not consistent with an estimate in Chapter 9 wherein the DRA states that "approximately 55 percent of the buildings in the commercial sector will qualify to be audited . . ."[68] Chapter 9 estimates that there are a total of 1,796,000 commercial buildings, and of these, 985,000 will qualify.[69] A six percent discrepancy between the estimate in Chapter 3 and Chapter 9 leaves the status of over 100,000 small commercial buildings in question.[70] Ignoring 100,000 small commercial buildings could substantially distort the DRA cost-benefit analysis. Meaningful cost-benefit analyses can only be based upon consistent and accurate data. It is impossible to tell which of these two estimates the DRA used in deriving its cost-benefit analyses for commercial buildings.

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[66] DRA, supra note 1, at 1-9. This definition is consistent with NECPA §710(b)(2).

[67] Id., at 3-5.

[68] Id., at 3-5.

[69] Id.

With regard the fee which can be charged directly to the customer for a commercial building audit, the DRA again expresses a preference that the audit fee be ". . . limited. . . , with the excess borne by all ratepayers. . ."[71] As we stated concerning Chapter 2, we are troubled by the DRA's reliance upon this method of encouraging CACS Program participation. Rate-basing these costs -- in lieu of permitting direct cost recovery from the commercial customer -- raises serious problems of equity for which DOE has provided no solution. Eligible commercial customers who choose not to participate in the CACS program, as well as residential customers, may be subsidizing program benefits for those who do elect to participate if these costs are rate-based. Furthermore, if the state regulatory authority does not permit the excess amounts to be rate-based, the utility's shareholders will, in essence,

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[70] Utilizing the DRA Chapter 9 data, A.G.A. has determined that over 200,000 buildings more would be included in the CACS Program under the Chapter 3 61% estimate:

Total Commercial Buildings --	1,796,000
Total Covered by CACS --	985,000 (54.8%)

If 61% of the total were covered by CACS, 1,096,560 buildings would be covered, or 110,000 more than were estimated under Chapter 9.

[71] Id., at 3-12.

subsidize the CACS Program. This result is not equitable, and it contradicts NECPA which reserves such decisions solely for the state regulatory authorities.[72] We believe that the most equitable result would be for state regulatory authorities to permit utilities to recover CACS Program audit costs directly from the eligible commercial customer. Furthermore, since DOE must issue a Federal Standby CACS Plan for those states which elect not to participate in the CACS Program,[73] we urge that DOE allow utilities to recover the full cost of commercial audits from eligible commercial customers.

Chapter 4: Related Government Programs

A.G.A.'s objection to this Chapter is that it incorrectly refers to the CACS Program as the "RCS extensions program."[74]

Chapter 5: Urban and Community Impact Analysis

As in Chapter 4, this Chapter also inaccurately describes the RCS and CACS Programs. It states that "Title VII extends the Residential Conservation Service Program created under Title II . . . to include multifamily dwellings . . . which are centrally heated, and small commercial buildings . . .".[75] While we recognize that, for the purposes of the Urban and Community Impact Analysis (UCIA), it may not be absolutely necessary to distinguish between CACS and RCS coverage, we believe that some effort should be made to rectify these inaccuracies.

We are concerned that the UCIA contains numerous inconsistencies in data and conclusions throughout its analysis. In addition to failing to agree as to the percentage of buildings affected in different locations and as to the age of those buildings,[76] the UCIA presents a significant conceptual inconsistency. The UCIA posits a "multiplier effect" as a benefit of the CACS Program.[77] This effect is the result of energy efficiency improvements in low-income multifamily dwellings which, in turn, generate further renovation efforts, including "a general improvement of downtown areas."[78] However, on the following page, the UCIA contradicts its theory of downtown improvement. The UCIA states that, as a possible negative impact resulting from the CACS Program, low-income tenants might be displaced as a result of improvements made in the building. The UCIA dismisses possible displacement as being unlikely because "a more thorough renovation job would have to be done in order to effectively enhance the overall building."[79] There is an apparent inconsistency in concluding, on the one hand, that the CACS Program possibly will have

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[72] Pub. L. 95-619, as amended, supra notes 8 and 9, §731(b)(3).

[73] Id., §741.

[74] DRA, supra note 1, at 4-1.

[75] Id., at 5-1.

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[76] *Id.*, at 5-6 and 5-7, we note these discrepancies:

CATEGORY	5-6	5-7
● Percent of buildings in urban areas	95% (see 5-3 also)	96%
● Percent in central city	57%	60%
● Percent *over* 20 years old	50%	50% (20 years or older)
● Percent older than 38 years	32%	40%

While a discrepancy of 1-8% may not appear to be significant, it can be quite significant when presenting a formal analysis of program effects covering a building population consisting of nearly one three-quarters of a million buildings. (Table 9-1 estimates that more than 710,000 buildings will be covered by the CACS Program.)

[77] *Id.*, at 5-10.

[78] *Id.*

[79] *Id.*, at 5-11.

a positive effect by stimulating downtown improvement, and, on the other hand, stating that a more thorough renovation job would be required to enhance tne overall building.

A G.A. also disagrees with UCIA's conclusion that the "intent of the law implies that the benefits of the program must accrue to the tenants and not the landlord."[80] This is patently untrue. While NECPA includes tenants in RCS Program coverage, the CACS Program does not entitle tenants in Title VII buildings to CACS Program participation.[81]

There are other inaccuracies in the UCIA. For example, the UCIA apparently does not understand that in certain situations, commercial buildings within shopping malls may be included under the CACS Program if those commercial establishments satisfy the definitions for commercial building and eligible commercial customer.[82]

Chapter 6: Institutional Impacts

A.G.A. is troubled by the DRA's description of the overall CACS Program impacts on the gas industry as being "very modest".[83] The DRA estimates these costs as amounting to ". . . less than one-half of one percent of revenues."[84] A.G.A.'s gas industry statistics for 1979 reveal that revenues for the gas utility industry for that year were $38,947,142,000. For 1979 _alone_, this "very modest amount" would have been $194,735,710.[85] The DRA estimates that the total program cost to 1990 for utilities will be $462 million.[86] Assuming that the DRA intends that the one-half of one percent estimate apply to total projected revenues for the gas industry to 1990, and assuming arguendo that gas industry revenues for the nine year period are equal to the revenues for 1979, the overall effect of the CACS Program on the gas industry would substantially exceed $1.7 billion. Furthermore, the DRA does not state whether annual Program costs would increase or decrease over time, as the implementation process proceeds over the nine year period. While we trust that the DRA does not intend such a result, the DRA should be revised to clarify the overall Program impacts.

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[80] _Id_.

[81] Pub. L. 96-619, _as amended_, _supra_ notes 8 and 9, §710(b)(6)(A).

[82] DRA, _supra_ note 1, at 5-12.

[83] _Id_., at 6-9.

[84] _Id_.

Finally, assuming that there is some quantitative basis for the $197 million amount, A.G.A. does not believe that this amount would be considered "very modest" by state regulatory authorities who will be asked to rate-base such costs or by the shareholders of utility companies whose state regulatory authorities refuse to allow such amounts to be rate-based.

The DRA states that natural gas conserved through the CACS Program may be sold to industrial customers at higher rates than would have been available had that gas been sold to residential customers.[87] This observation belies the fact that there are substantial statutory demand constraints which could prevent these sales.[88] Furthermore, industrial customers generally pay *less* for gas than do residential customers.[89]

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[85] Gas Facts, supra note 22, at 103.

[86] DRA, supra note 1, at 1-20.

[87] Id., at 6-7.

Finally, the DRA predicts that the CACS Program will require only 400 additional persons and $15 million to administer the Program at the state level.[90] However, the DRA does not take into consideration that some states may elect not to participate in the CACS Program. If this is the case, utilities may be required to assume part of the responsibility for CACS Program administration under the Federal CACS Standby Authority. Thus, utilities may be required ultimately to assume some of these costs.

Chapter 7: Cost of Energy

In spite of its stated purpose, this Chapter does not demonstrate the importance of energy costs to the CACS Program. In fact, energy cost projections are not used anywhere in the DRA to evaluate the cost-effectiveness of the program, or to evaluate the customer participation levels which are essential to the energy savings and ultimate success of the CACS.

The DRA's conclusion that the impact of energy prices on the CACS program can be projected using an index of relative prices is incorrect. It is not the *relative* price of energy that will determine the rate of retrofit and subsequent energy savings, but the *actual* prices (*i.e.*, dollars saved versus the cost to retrofit). The payback criterion, which the DRA does not apply to this analysis, is the proper way to evaluate conservation investments and determine energy savings.

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[88] *E.g.*, the Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95-620; 92 Stat. 3289; 42 U.S.C. §8301; and Title II of the Natural Gas Policy Act of 1978 (incremental pricing), Pub. L. 95-621; 92 Stat. 3350; 15 U.S.C. §3301.

[89] *Gas Facts*, *supra* note 22, at 118.

[90] DRA, *supra* note 1, at 6-10.

In addition, the Chapter includes a superfluous discussion of the marginal costs of energy which has no relation to actual utility rate structures, and incorrectly compares gas and oil wellhead prices with retail electric prices in an inaccurate attempt to determine future growth rates.[91]

Chapter 8: Potential Energy Savings in Buildings

This Chapter states that total energy use in small commercial buildings is only 15% of the total commercial sector energy consumption, thus limiting the savings potential for retrofits in this category. This assessment illustrates the limitations of CACS Program, which -- according to the DRA -- will save an estimated 1 percent of total commercial energy consumption per year (i.e., in 1979, this would have been a total of 80 TBtu per year out of an estimated 1979 commercial energy consumption of 8.0 quads).[92] A recent A.G.A. survey of gas utilities indicates that commercial gas customers reduced per-user consumption by an average of 2.2%/year between 1973 and 1979, prior to the CACS Program.[93]

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[91] Id., at 7-1 through 7-7.

[92] A Survey of Actual and Projected Conservation in the Gas Utility Industry: 1973-1990, American Gas Association (Arlington, Virginia, March, 1981.

[93] Estimate of total commercial end-use consumption: Gas - 2.5 quads (Gas Facts, supra note 22, at 83); Electricity - 1.7 quads (Statistical Yearbook, supra note 24, at 2); Coal - 0.2 quads (DOE, Monthly Energy Review, January, 1981, at 22); Fuel Oil - 3.6 quads. This fuel oil estimate is derived by calculating the difference between total residential/commercial consumption of 6.9 quads, shown by DOE's Monthly Energy Review, and estimated residential fuel oil consumption of 3.3 quads based on 15.8 million oil heated homes @1500 gallons/home. Using this break-out, fuel oil represents 45% of total commercial consumption of 8.0 quads.

The section also concludes that "savings of at least 15 to 20 percent of [an audited building's] total energy use should be realized from implementation if recommended retrofit measures.[94] Given this assessment, it is not clear why energy savings for commercial and multifamily buildings vary in each of the four cases examined, ranging from a 5%-10% savings in the "no-action" case to 20%-25% in the "enhanced rules" case.[95] The DRA offers no explanation as to why a retrofit done without a mandatory CACS Program would save less energy than a retrofit done under the Proposed Rule. Assumptions such as these act to bias the results in favor of the Proposed Rule.

Chapter 9: RCS Coverage

It is not clear as to which of the references listed in Chapter 12 was used to compile the data presented. Therefore, it is difficult to verify the information given. Nevertheless, by using the DRA data only, we do not believe that the DRA has correctly calculated the number of buildings which will be covered in this Program. Our analysis was exacerbated, however, because it is difficult to determine whether the DRA considered buildings which are eligible under both electric and gas energy use criteria and counted them only once in determining the total building number.

Using information contained in Tables 9-3 and 9-7,[96] the total eligible commercial floor space and total number of eligible buildings can be calculated. We derived the following chart from information in those tables to show the percentage of the commercial sector covered by the CACS Program:

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[94] DRA, *supra* note 1, at 8-9.

[95] *Id.*, at 10-25.

[96] *Id.*, at 9-15.

	% of Buildings	% of Floor Space
Fossil (<1,000 therms)	59.5%	11.0%
Electric (<4,000 Kwh)	16.0%	1.1%
Total eligible (some buildings are counted twice)	75.5%	12.1%

Based on this chart, it appears that gas utilities will be auditing over three times the number of buildings that the electric utilities will be auditing and will audit ten times the floor space. We recognize that the "fossil" fuel category includes oil as well as gas; however, there is no indication in the DRA as to a projected participation rate for oil dealers. Nevertheless, there is a disproportionate burden placed on the gas utility industry.

As we discussed earlier, the DRA estimates that approximately 55% of the buildings in the commercial sector will be covered by the CACS Program.[97] These structures account for approximately 8.9 percent of the energy consumed by the commercial sector.[98] A.G.A. believes that this conclusion is the most eloquent argument against DOE's choice of Option 2 as the interpretation for the commercial building definition. To require that 55 percent of the nation's commercial buildings be audited when this target group uses only 8.9 percent of the total commercial building energy use[99] is ludicrous. By selecting Option 1 -- as we propose in our Written

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[97] *Id.*

[98] *Id.*

[99] *Id.*

Comments -- DOE will reduce the total number of buildings covered, thereby reducing the costs of the CACS Program for covered utilities.

Chapter 10: Methods of Analysis

The Tables on page 10-25 make unsubstantiated assumptions which constituted the input data for the multifamily and commercial building analyses. These assumptions contain the essential data upon which the DRA rests, yet they are impossible to evaluate without substantiation. For example, the DRA predicts that the Proposed Rule will result in a retrofit to audit ratio of two-thirds.[100] Furthermore, customers who retrofit are projected to experience a 20 percent energy savings.[101] A.G.A. does not believe that describing the workings of the Oak Ridge National Laboratory Residential and Commercial Energy Models provides sufficient justification for the assumptions contained the Tables describing the input data.

Chapter 11: Regional Studies

Option 1 for commercial buildings was not analyzed in this Chapter "due to time restrictions."[102] A.G.A. would be particularly interested in the results of such an analysis, since we believe that Option 1 is the only Option entirely consistent with the NECPA definition of commercial building. Furthermore, since the DRA concludes that "all of the Options are cost-effective in all of the regions,"[103] A.G.A. believes that serious consideration should be given to Option 1.

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[100] Id., at 10-25.

[101] Id.

[102] Id., at 11-5.

[103] Id., at 11-3.

CONCLUSION

The DRA does not present data adequate to support its conclusions. The conclusions reached by DOE from the DRA for the CACS Program cannot be evaluated unless additional specific data are presented. The DRA presents a large amount of qualitative information, without providing the supporting data to the final figures necessary to evaluate the cost-effectiveness of the Program. Specifically, the following information must be included in the DRA:

- The amount of gas, electricity and oil which comprise the 14 MBOE/year estimated annual program savings shown in the DRA,[104] and the relative value, if any, the DRA has associated with each fuel type. Treating gas and oil as the same "fossil fuel" (as discussed in Chapter 9) is unrealistic and inconsistent with present federal policy, which encourages gas use to "back-out" oil in many applications.
- The anticipated participation level of fuel oil dealers, whose participation is not mandatory under NECPA. According to A.G.A. estimates, fuel oil accounts for 45% of commercial energy consumption.[105] A low participation rate for fuel oil dealers would significantly limit the Program's effectiveness.
- A breakout of Program cost figures for electric and gas utilities, and the methodology for arriving at these figures.
- A more detailed explanation of the multifamily sector, including percentage of units covered specifically by the CACS Program which comprise part of the 9 MBOE/yr. projected energy savings.[106]

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[102] Id., at 11-5

[103] Id., at 11-3.

[104] Id., at 1-20

[105] Supra note 93.

[106] DRA, supra note 1, at 1-20.

- An explanation as to why annual energy savings and program costs are assumed to be constant through 1990.[107] It is extremely likely that the Program will not be cost-effective initially until retrofits are widely accepted. DOE should state whether the assumed audit/retrofit rates and costs represent averages, and at what point in time the Program becomes cost-effective. These data are essential for utility planning.

In addition to the foregoing problems, the DRA does not adequately assess the program impact on gas utilities, where a significant number of customers will be included in the Program. The 1,000 therm/month threshold represents an annual consumption of 1200 MMBtu and is 65% greater than the 1979 average annual gas consumption for a commercial customer (726.5 MMBtu).[108] Thus, the compliance burden for gas utilities will be substantial. The DRA makes no attempt to analyze this situation in relation to potential savings or program costs.

Finally, the DRA does not give adequate attention to analyzing the alternative approaches to the Proposed Rule. The DRA assesses three alternative approaches to the Proposed Rule case, none of which would comply with NECPA and would therefore require legislative change. Furthermore, DOE has not attempted to analyze reasonable alternative interpretations to Option 2 in defining "eligible commercial customers." While the DRA admits that both Option 1 and 2 would comply with NECPA, Option 2 was selected for incorporation in the Proposed Rule. Nevertheless, A.G.A. believes that only Option 1 is consistent with NECPA.

American Gas Association
Legislative and Regulatory
Affairs Division

March 17, 1981

ARH/ajb

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[107] *Id.*, at 1-21.

[108] *Gas Facts*, *supra* note 1, at 69.

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STATEMENT OF THE AMERICAN HOSPITAL ASSOCIATION
TO THE
OF THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS
ON
S.1080, THE REGULATORY REFORM ACT OF 1981

July 10, 1981

After years of dealing with a federal regulatory system that has become increasingly costly, burdensome, and unwieldy, the American Hospital Association and its member institutions are heartened by recent Congressional and Administration initiatives to reform the regulatory process. We are pleased to present our views on S.1080, the Regulatory Reform Act of 1981. The Association represents over 6,300 health care institutions--including most of the nation's hospitals, as well as many long-term care institutions, mental health facilities, and hospital schools of nursing.

For the past several years AHA has been an active participant in the movement for regulatory reform. In 1975, its Board of Trustees appointed a panel of experts to study hospital regulation. After an intensive 18-month study, that panel issued its report in May 1977, entitled Hospital Regulation, Report of the Special Committee on the Regulatory Process, which documents the evolution of the current, piecemeal hospital regulatory system, analyzes the system's deficiencies, and presents some 33 specific recommendations on steps that should be taken to achieve a more rational, coordinated, and open system of regulation for the hospital industry.

In the 96th Congress, AHA testified before House and Senate committees on implementation of Executive Order 12044, the Carter Administration regulatory reform directive, and on major regulatory reform proposals which received extensive Congressional consideration. Although comprehensive regulatory reform legislation was not passed by Congress in 1980, we viewed with approval the enactment of the Regulatory Flexibility Act (P.L.96-354) and the Paperwork Reduction Act (P.L.95-511). In 1979 AHA also provided information and assistance to the U.S. Regulatory Council and participated in its hospital project, a study of the impact of regulations on hospitals.

In 1981, AHA welcomed President Reagan's action in issuing Executive Order 12291, and has worked to assist in its successful implementation. Recently we identified and submitted to the Presidential Task Force on Regulatory Relief, chaired by Vice President Bush, a list of 10 priority hospital regulations in need of reform. A copy of that submission is attached to our statement for the committee's information. In addition, AHA is presently developing recommendations for the Health Care Financing Administration's (HCFA) task force on deregulation, established to identify rules which might be revised or deleted. And, finally, we welcome this opportunity to participate in the renewed Congressional debate on regulatory reform by presenting our views on S.1080.

Our statement addresses the following: (1) hospital involvement with the regulatory process; (2) the need to enact regulatory reform legislation; (3) general observations about S.1080; and (4) major issues in S.1080, together with AHA's recommendations for improving the legislation. In connection with the discussion of major issues we also would like to comment on the subject of legislative veto, including our recommendation for a workable alternative. Although this issue is embodied in legislation (S.890) currently before the Judiciary Committee's subcommittee on agency administration, legislative veto is a major topic in the regulatory reform debate, and we believe this Committee will find it useful to have our views on this matter.

HOSPITAL INVOLVEMENT WITH THE REGULATORY PROCESS

Although the subject of regulation is usually considered in the context of business and industry, health care is clearly one of the most highly regulated activities in this country. AHA recognizes that some regulation in the health field is appropriate since the government must protect the public interest and ensure responsible use of tax dollars in the purchase of health care services.

However, over the past few decades, government regulation of hospitals at the federal, state, and local levels has increased enormously, creating a patchwork of uncoordinated and frequently duplicative regulations. Today, almost every aspect of hospital operations is subject to regulation. A variety of regulations are aimed especially at controlling hospital activity--many governing hospital involvement in federal and state health programs--such as professional standards review organizations (PSROs), utilization review, certificate of need, areawide planning, Medicare conditions of participation, and reimbursement regulations. Hospitals also are subject to the wide variety of regulations which apply to employers and businesses generally, including requirements of the Occupational Safety and Health Administraion (OSHA), as well as tax, labor, and environmental protection regulations. These examples, while by no means exhaustive, demonstrate the broad range of federal, state, and local regulations that affect hospitals.

The extent of federal regulation of hospitals is further evident in our Association's activity in Washington on behalf of its member institutions. In the three-year period of 1978-1980, AHA reviewed 3,448 federal agency notices published in the Federal Register, of which at least 753 were notices of proposed or final regulations affecting hospitals and the delivery of health care services. This review activity resulted in the submission by the Association of 226 formal comment letters or testimony at agency hearings.

The costs to hospitals of complying with federal regulations are enormous. Some of these costs are easily identified, such as increases in paperwork, time, and involvement of personnel. For example, AHA estimated that the cost of compliance with the uniform reporting requirements of HHS's proposed Annual Hospital Report (AHR, formerly the System for Hospital Uniform Reporting, or SHUR) would average between $20,000 and 40,000 per hospital, or a total of $120 million to $240 million nationwide. However, there are other long-range costs to society which are more difficult to isolate and quantify, such as the reduced incentive for innovation that occurs in a highly regulated environment.

THE NEED FOR REGULATORY REFORM LEGISLATION

AHA was pleased by President Reagan's swift action in issuing Executive Order 12291 shortly after taking office, and we believe this initiative--with its more extensive regulatory analysis requirements, its requirement for memorandums of law demonstrating compliance with legislative intent, and the enhanced oversight role it provides for the Office of Management and Budget (OMB)--will improve agency compliance with regulatory reforms beyond that which resulted from the directive it superceded, E.O.12044.

An OMB evaluation of agency compliance with Executive Order 12044, issued in September, 1979, recognized hospitals' concern that agencies within HHS (then HEW)--specifically the Health Care Financing Administration and the Health Resources Administration--had not complied fully with the revised regulatory procedures mandated by the executive directive. The report noted that the department in certain instances had not performed regulatory analyses on proposals that would have a substantial economic impact. Specifically cited were regulations on Medicare reimbursement for malpractice insurance costs, Hill-Burton uncompensated care, and SHUR. The report further noted that only a handful of the 425 regulations under development at that time had been scheduled for regulatory analyses.

Pressure from OMB, AHA, and other organizations, as well as adverse publicity associated with the findings we have described, subsequently led HEW to bring its regulatory procedures into closer alignment with the spirit of Executive Order 12044, and the performance of the department in issuing regulations improved in the last years of the Carter Administration. Nevertheless, AHA believes that Presidential reform directives, because of their transitory nature, cannot provide a permanent solution to the problem of excessive and inequitable federal regulation. We feel that enactment of regulatory reform legislation, along the lines of S.1080, is necessary to bring about permanent improvement in federal regulatory practices.

GENERAL OBSERVATIONS ON S.1080

AHA views S.1080 as a very constructive approach for bringing about meaningful regulatory reform. We endorse the bill's objective to implement most of its proposed reforms by amending existing Chapter 5 of the Administrative Procedures Act (APA) rather than by embodying its changes in a new Chapter 6. A key advantage to this approach, in our view, is that the bill's procedural reforms would be integrated into the well-recognized main body of the APA's requirements for the issuance of regulations. In so doing, the bill would make most agency procedural actions, including the decision on whether a proposed rule requires the completion of a cost-benefit analysis, subject to judicial review. The bill would exclude from judicial review only questions on the adequacy of the analyses and, in certain cases, questions on an agency's not having provided an opportunity for oral presentations, including crossexamination where needed to resolve factual issues.

Other provisions which we strongly support include the following:

Cost-Benefit Analysis: AHA supports new Section 553(c)(2), which would require that agencies perform analyses of the projected benefits, costs, and adverse effects of all major rules, and of reasonable alternatives to achieve agency goals. Such analyses would help to form the basis for a rational and systematic process of agency consideration before the issuance of final regulations.

60-Day Comment Periods: New Section 553(d)(1) would require a minimum 60-day comment period for all proposed rules. AHA has recommended statutory enactment of such a requirement for a number of years and supports this provision of S.1080.

Removal of APA Exemption for Loans, Grants, and Contracts: The provisions of new Section 553(a) and (b) would have the effect of removing the present APA exemption for matters relating to ". . .loans, grants, benefits, or contracts." AHA has long been concerned that this provision technically exempts Medicare and Medicaid regulations from all APA requirements. Participation in Medicare and Medicaid is mandatory for most hospitals, and these programs are currently used as the primary vehicle for a variety of significant federal regulations designed to control or modify the entire health care delivery system. Unquestionably, regulations of such magnitude should be subject to the APA's rulemaking procedures.

The decision to voluntarily follow APA procedures was made several years ago by HEW, but without statutory change hospitals are still vulnerable to agency misuse of this exemption. AHA has had a long-standing commitment to work toward deletion of this APA provision, and we are pleased to see this change included in S.1080. We have a clarifying amendment to suggest for this provision, which we will present later in our statement.

Use of Consultants: New Section 553(e)(3) would limit agency use of consultants to the collection of information in their development of cost-benefit analyses of major rules. AHA believes agencies could achieve a better understanding of the impact of proposed major rules if they performed regulatory analyses entirely in-house. We recognize that most agencies do not at present have adequate in-house resources for performing their own analyses and that S.1080 anticipates this problem by delaying the effective date of this provision until 1983 and by allowing agencies a limited use of consultants in preparing analyses. Consequently, we support the intent of this provision.

Avalability of Data: New Sections 553(c)(1)(E), 553(e)(1)(E), 553(e)(4), and 553(f)(1), when combined, would require that all data, methodologies, reports, studies, or other information used to develop a rule be identified and described (including their sources), and that this information be placed in the rulemaking file and be available for public inspection and/or copying. AHA strongly supports these provisions. In the past we have experienced many problems in obtaining access to data used in the development of regulations, particularly in connection with revisions by HCFA of the annual Section 223 limits on hospital reimbursement for routine costs under Medicare.

MAJOR ISSUES IN S.1080; AHA RECOMMENDATIONS FOR IMPROVING THE BILL

Definitions

Major Rule: AHA agrees that the criteria for a "major rule" should not be tied solely to the judgment of the issuing agency. However, we are concerned that the definition of "major rule" in S.1080 does not include a recognition of the cost-shifting that can result from changes in federal regulations. Earlier in this statement we mentioned the regulations governing reimbursement for hospitals' malpractice insurance costs, for which then-HEW performed no regulatory analysis despite its own estimate that this regulatory change would result in a shift in costs from the federal government to the private sector of more than $300 million in the first year. The department refused to recognize this cost-shifting as a basis for a regulatory analysis, maintaining that the requirement for an analysis applied only to "new" costs. Accordingly, AHA believes that the definition of "major rule" should be amended to include any proposed regulation which would cause a substantial shift in costs borne by the federal government to the private sector.

Last year, AHA was successful in having clarifying language added to the House Judiciary Committee's report on H.R.3263 (H.Rept. 96-1393, p.39), to the effect that a consideration of cost-shifting was intended to be covered under the bill's criterion deeming a major rule to be one which the issuing agency estimates will result in "a substantial change in costs or prices for individual industries..." (emphasis added). This same criterion currently is included in H.R.746, the major regulatory reform bill under consideration in the House. AHA is concerned that S.1080's definition of "major rule" has, as a parallel criterion, "a substantial increase in costs or prices for wage earners, consumers, individual industries, federal, state, or local governments, or geographic regions" (emphasis added).

It might be argued that a major cost shift resulting from, for example, a Medicare regulation would lead to increased expense to several of these parties (i.e., wage earners, consumers, and individual industries), since part of the cost to providers would likely be passed on to private insurance companies, and from them to businesses and consumers in the form of higher health insurance premiums. However, it also might be argued that such a regulation would decrease costs to another party covered in the criterion--namely, the federal government. AHA believes that rules which cause major cost shifts clearly should be made subject to regulatory analysis, but the criterion in S.1080 cited here is ambiguous in its application to this type of regulation. Consequently, AHA recommends the addition of a separate major rule criterion to address the cost-shifting phenomenon.

Emergency Rule: AHA is pleased to note that the definition of "emergency rule," combined with the provisions of new Section 553(b)(3), would allow agencies to issue such rules as final only on a temporary basis, and would require the agencies eventually to promulgate the rules anew under appropriate procedures. However, S.1080 provides no deadline for doing so, only requiring [in Section 553(b)(3)(B)] that it be done "as soon as practicable" and that the emergency rule not be effective longer than for "a reasonable period necessary to complete agency compliance" with standard regulatory procedures [Section 553(b)(3)(C)]. AHA recommends that these provisions be modified to establish a definitive guideline of 180 days for reissuuance of emergency rules through the established regulatory process.

Judicial Review

Determination of "Major Rules": As noted earlier, a key advantage of making most of S.1080's reforms in the form of amendments to Chapter 5 of the APA is that this would make most questions of agency compliance, including the decision of whether a proposed regulation is a major rule, subject to judicial review. AHA strongly supports this aspect of S.1080.

Modified "Bumpers Amendment": The original Bumpers amendment, passed by the Senate in 1979, drew widespread support but also raised serious questions about the long-range effect of (1) shifting the burden of proof from the challenger to the agency and (2) prohibiting the courts' traditional deference to agency interpretations on questions of law. Opponents argued that the Bumpers amendment, by upsetting a relatively fine-tuned system of shared judicial and administrative responsibility for interpreting legislation that granted broad agency discretion, would create a serious burden of litigation for the nation's courts. Further, opponents argued that the Bumpers proposal would create confusion in litigation because the resulting need to draw a definitive line between law and fact would require evidentiary proceedings in court, a needless duplication of the administrative process. AHA supported the intent of the Bumpers amendment but also found merit in the arguments against the proposal. Consequently, the Association did not take a position on the amendment in the 96th Congress.

AHA believes that the modified Bumpers amendment, included in new Section 706 of S.1080, adequately addresses the major concerns associated with the original proposal. AHA supports this modified provision.

Legislative Veto—AHA's Recommended Alternative

As introduced, S.1080 does not contain a legislative veto provision, but we would like to take this opportunity to present our views on this important issue, which is embodied in a proposal (S.890) currently before the Judiciary Committee's subcommittee on agency administration and in other legislative proposals now before Congress. We would like to present an alternative which builds upon an existing requirement in S.1080, one which we believe would achieve many of the goals of legislative veto yet avoid many of its problems, and controversy as well.

AHA has long supported efforts to provide effective Congressional oversight of the federal regulatory process, and in 1975 our Association testified in favor of the one-house legislative veto concept which was the predecessor of the provision currently embodied in S.890 and, in the House, in H.R.1776. Since our original endorsement of legislative veto, however, the Association has given more extensive consideration to the potential effectiveness and legal implications of this proposal.

Supporters of legislative veto view it as a solution to the problems created by three aspects of the federal government--an increased delegation of authority from Congress to the executive branch, a Congressional oversight process that is random and lacks adequate staff resources, and an overburdened judicial system. However, none of the major forms of legislative veto now before Congress holds much promise for remedying these problems. The one-house veto, while offering the advantage of achieving quick action on a regulation which has exceeded Congressional intent, may be more susceptible to political pressures than a two-house veto, and also raises serious questions of constitutionality. The two-house veto, now included in H.R.746 and introduced in the Senate as S.344 by Senators Levin and Boren, would involve a time-consuming process which might well come to naught should the President subsequently veto the required Senate/House joint resolution of disapproval.

Consequently, AHA does not believe it can support legislative veto as a means to better assure agency compliance with Congressional intent. However, in keeping with our policy of working for improved Congressional oversight over regulation, we wish to present an alternative procedure for the Subcommittee's consideration.

There is a new procedural requirement in Executive Order 12291 which, if modified, could accomplish the goals of legislative veto. Section 4(a) of the Executive Order states that before an agency approves a final major rule it must:

> "Make a determination that the regulation is clearly within the authority delegated by law and consistent with Congressional intent, and include in

> the Federal Register at the time of promulgation a memorandum of law supporting that determination."

S.1080, in new Section 553(e)(1)(C), would conform to the Executive Order by requiring publication of a memorandum of law for final rules. AHA believes that this memorandum-of-law concept--if it were broadened to require publication at the Notice of Proposed Rulemaking (NPRM) stage as well as with the final rule, and to mandate minimum content of the memorandum--would make it more difficult for agencies to ignore or circumvent Congressional intent. Currently, agency statements of statutory authority and legislative intent are contained in preambles to regulations and are usually perfunctory in nature. More complete agency analyses of authority and intent often are privileged documents held within an agency and are not subject to public inspection under the Freedom of Information Act. In addition to making more certain agencies' adherence to Congressional intent, we believe that publication of a memorandum of law, particularly at the NPRM stage, would enhance the quality of debate on regulations at the proposed stage.

Accordingly, AHA recommends that the memorandum-of-law requirement be applied to the NPRM stage by broadening new Section 553(c)(1)(B) [statement of statutory authority] to require publication of such a memorandum for proposed as well as final rules. Further, we recommend adding an appropriate definition of "memorandum-of-law" to Section 551. AHA is currently working on a definition of this term and will be pleased to share it with the Subcommittee when it is completed.

AHA believes the memorandum-of-law alternative offers a number of advantages over the various legislative veto proposals. It would: (1) not create a cumbersome Congressional process; nor would it create an administrative burden for agencies since it would simply require public disclosure of information routinely developed; (2) not engender conflicts over the constitutional separation of powers; and (3) support and strengthen existing oversight mechanisms, including public comment, Congressional oversight, OMB oversight, and judicial review.

AHA strongly recommends consideration of this memorandum-of-law alternative to the subcommittee, and will gladly offer additional information and assistance in this matter.

Other Legislative Issues

APA Exemption: As mentioned earlier, AHA supports removing the existing APA exemption for loans, grants, and benefit programs. However, one element of the proposed new language is troublesome. New Section 553(b)(1)(D) would exempt any "rule for which the agency for good cause finds that notice and public comment are unnecessary due to the routine nature of the matter or the insignificant impact of the rule." It is conceivable that HHS might interpret this provision as an exclusion of notice and public comment on the annual revision of Section 223 limits on hospital reimbursement for routine costs--a regulatory change which has an economic impact of several million dollars each year. AHA believes this potential problem could be eliminated by changing the "or" to read "and." Revisions of Medicare reimbursement limits may be considered routine, but they are never insignificant.

Extended Comment Periods: As we also mentioned earlier, AHA supports the minimum 60-day comment period for proposed rules that would be required by new Section 553 (d)(1). In addition, new Section 553(d)(2) would require that an agency grant a 30-day extension for comments if requested to do so by an affected party within a stipulated time period. However, this provision would allow agencies to deny the request by issuing a written finding that doing so would be "contrary to the public interest." We believe this language is overly broad and could result in an arbitrary denial simply for the convenience of the agency. AHA recommends that the provision be amended by borrowing language from S.1080's proposed definition of "emergency rule" to limit denials to those cases in which an extension might "seriously injure an important public interest or seriously damage a person or class of persons without serving any important public interest."

Requests for Agency Clarifications: H.R.746, the House's major regulatory reform proposal, contains an important provision which we would recommend be added to S.1080. Section 201(c) of that measure would amend Section 553 of the APA to require that agencies respond to requests for clarification or interpretation of a regulation, and that they establish procedures for doing so, including setting time limits for issuing a response. Agencies' lack of response to such requests has been a problem for our Association, but more so for individual hospitals, particularly with regard to Medicare reimbursement regulations. Many hospitals have tried to obtain reliable HCFA interpretations on whether a certain planned expenditure would, if made, be regarded as an allowable cost for Medicare reimbursement purposes. HCFA generally has neglected to provide this clarification, leaving the hospital in the position of having to make the expenditure and find out later, during its cost report audit, whether the cost was deemed allowable. When such expenditures have not been deemed allowable, providers frequently have incurred substantial legal costs in appealing the ruling, all because of an agency's refusal to respond to a request for clarification. AHA recommends inclusion in S.1080 of language similar to the House bill's requirement.

CONCLUSION

AHA believes S.1080 is a very constructive regulatory reform proposal, and we look forward to working with the Committee as it further refines and improves the bill. We appreciate this opportunity to present our views on this legislation and we stand ready to provide the Committee with additional information on any issue addressed in our statement.

STATEMENT ON THE REGULATORY REFORM ACT

JAMES E. FRECH, ASSOCIATE DIRECTOR
ILLINOIS GENERAL ASSEMBLY, WASHINGTON OFFICE
ILLINOIS COMMISSION ON INTERGOVERNMENTAL COOPERATION

before

U.S. SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS
JUNE 23, 1981

MR. CHAIRMAN, I APPRECIATE THE OPPORTUNITY TO PRESENT THIS STATEMENT FOR THE HEARING RECORD IN CONSIDERATION OF THE BILL S. 1080, THE REGULATORY REFORM ACT.

S. 1080

THIS BILL WOULD SET OUT CHANGES IN THE PROCEDURAL REQUIREMENTS AGENCIES MUST FULFILL WHEN RULEMAKING. UNDER THIS BILL ALL PROPOSED RULE PROVISIONS WOULD BE PUBLISHED IN THE *FEDERAL REGISTER* WITH A NOTICE THAT MUST CONTAIN CERTAIN STATEMENTS AND DISCUSSIONS ABOUT THE PROPOSED PROVISIONS. AT LEAST 60 DAYS MUST BE PROVIDED FOR INTERESTED PERSONS TO SUBMIT WRITTEN COMMENT. THE PROPOSED PROVISIONS, WHEN FINALIZED BY THE AGENCY, MUST THEN BE PUBLISHED IN THE *FEDERAL REGISTER* AT LEAST THIRTY DAYS BEFORE THEIR EFFECTIVE DATE AND BE ACCOMPANIED BY A STATEMENT OF THEIR BASIS AND PURPOSE, WHICH IS TO INCLUDE A "MEMORANDUM OF LAW" AMONG OTHER REQUIREMENTS. COMPLIANCE UNDER THESE PROVISIONS RESULTS IN A RECORD WHICH IS JUDICIALLY REVIEWABLE.

S. 1080 FURTHER AMENDS CHAPTER 6 OF TITLE 5 U.S.C. TO CALL FOR ADDITIONAL ANALYSES TO BE MADE AND THE RESULTS TO BE PUBLISHED WHEN EVER A RULE IS DETERMINED TO BE "MAJOR" UNDER SPECIFIC CRITERIA SET OUT IN THE STATUTE. FOR THE PURPOSES OF SUCH ANALYSES A MAJOR RULE IS DEFINED BY A MACROECONOMIC COST MEASUREMENT, 100 MILLION DOLLARS BEING THE THRESHOLD. ANY RULE CAN ALSO BE DESIGNATED AS BEING "MAJOR" UNDER AUTHORITY PROVIDED TO THE PRESIDENT OR AN OFFICER DESIGNATED BY HIM. THE NEW PROVISIONS IN CHAPTER 6 WILL RESULT IN ANALYSES THAT BECOME PART OF THE RECORD AS A WHOLE. THE BILL ALSO CONTAINS CLARIFYING SECTIONS ON JUDICIAL REVIEW AND VENUE AND A PROPOSED NEW SUBCHAPTER III TO CHAPTER 6 CALLING FOR THE REVIEW OF AGENCY RULES. THIS STATEMENT WILL NOT COMMENT ON THESE PROVISIONS.

REGULATORY REFORM AS ENVISIONED BY S. 1080 IS ABSOLUTELY NECESSARY IF WE BELIEVE THAT BETTER GOVERNMENT CAN COME FROM RULEMAKING THAT IS PLANNED WELL AND THOUGHT THROUGH. A LONGER COMMENT PERIOD, FOR EXAMPLE, CREATES AN ABILITY FOR THE FEDERAL GOVERNMENT TO TAKE ADVANTAGE, FREE OF CHARGE, OF A WIDE RANGE OF PERSPECTIVES, EXPERIENCES AND EDUCATION. AS THIS BILL PRESCRIBES GUIDELINES AND DIRECTS AGENCIES TOWARD BETTER THINKING BEHAVIORS, IT WILL ALSO SERVE A GOOD END.

S. 1080 WOULD MAKE ONE CHANGE WHICH I THINK IS A LARGER STEP THAN PEOPLE REALIZE. THIS BILL REDEFINES RULEMAKING TO REMOVE AN EXCLUSION THAT TOOK BENEFITS, GRANTS, CONTRACTS AND LOAN RULEMAKING, AT LEAST FORMALLY BY STATUTE, OUT OF PUBLIC NOTICE AND COMMENT PROCEDURES. IN MY VIEW, THERE HAS BEEN A GAP IN LAW EVER SINCE THIS SPECIAL PROVISION OF THE ADMINISTRATIVE PROCEDURE ACT OF 1946 (APA) WAS ENACTED. THE REMOVAL OF THIS EXCLUSION IS THE MOST IMPORTANT ASPECT OF THIS REGULATORY REFORM PROPOSAL.

UNGUIDED INTERGOVERNMENTAL SYSTEM

IT IS NOT CLEAR THAT SIMPLY REMOVING THIS EXCLUSION WILL BRING CONSISTENCY AND GOOD RULEMAKING TO THE INTERGOVERNMENTAL SYSTEM. THE ENTIRE SYSTEM, IF YOU WILL ALLOW ME TO CHARACTERIZE IT AS SUCH, HAS DEVELOPED ESSENTIALLY WITHOUT THE GUIDELINES OR DIRECTIONS THAT THE APA HAS PROVIDED AND WITHOUT THE TEST OF JUDICIAL REVIEW OVER THE ADEQUACY OF RULEMAKING. I CAN MAKE A VERY STRONG CASE THAT THE ENTIRE AREA OF INTERGOVERNMENTAL RELATIONS, ITSELF, IS NOT WELL UNDERSTOOD, AND LACKS GUIDELINES AND CONGRESSIONALLY INSPIRED GENERAL DIRECTIONS. TO ILLUSTRATE THE NEED, THE PRESIDENT HAS RECENTLY ESTABLISHED AN ADVISORY COMMITTEE ON FEDERALISM. AT THE SAME TIME, THIS COMMITTEE IS CONSIDERING LEGISLATION TO ESTABLISH A HOOVER-LIKE COMMISSION TO STUDY THE OPERATIONS OF ALL GOVERNMENT LEVELS. THIS COMMITTEE HAS ALSO RECENTLY RECEIVED AN INCONCLUSIVE REPORT FROM THE OFFICE OF MANAGEMENT AND BUDGET (OMB) IN RESPONSE TO THE FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT (PUBLIC LAW 95-224), WHICH WAS TO ADDRESS THE FEASIBILITY OF PRODUCING A COMPREHENSIVE SYSTEM OF GUIDANCE FOR FEDERAL ASSISTANCE. I WOULD LIKE TO PRESS HOME TO THE MEMBERS OF THE COMMITTEE THAT THE INTERGOVERNMENTAL SYSTEM IS NOT WELL UNDERSTOOD. CAN ANYONE DEFINE WHAT THE WORD "PROGRAM" REALLY MEANS? WHAT IS A "GRANT" (PUBLIC LAW 95-224 SIMPLY PROVIDES A DIFFERENTATION BETWEEN INSTRUMENTS BUT DOES NOT DEFINE EITHER OF THEM); IS IT TO BE TREATED IN LAW AS DIFFERENT THAN A COMMON CONTRACT?

IN MY VIEW, THE UNCERTAINTY, OR THE LACK OF COMMONLY RECOGNIZED BASIC CONCEPTS, PROVIDES WIDE LATTITUDE TO FEDERAL AGENCY OFFICIALS WHEN THEY PROCEED TO IMPLEMENT THE LAWS THROUGH RULEMAKINGS AND ORDERS. SUCH DISCRETION MAY NOT ALWAYS SERVE THE PURPOSES OF BETTER GOVERNMENT. IT IS NOT DIFFICULT TO SEE WHY THERE IS A CONTINUAL CLAMOR ABOUT OVERREGULATION, I.E., INTRUSIVENESS, PRESCRIPTIVENESS, AND SO FORTH; AND ABOUT WASTE AND INEFFICIENCY, I.E., DUPLICATION, PAPERWORK, PRESUMPTION, AND SO FORTH. THE POINT IS, THAT REGULATORY REFORM LEGISLATION PROVIDES AN OPPORTUNITY TO FILL A GAP IN LAW, TO PROVIDE GUIDELINES AND DIRECTIONS AND MINIMUM ESSENTIAL RIGHTS AND PROCEDURAL PROTECTIONS IN A SYSTEM THAT IS NOT NOW WELL-GUIDED; AND HAS SUFFERED FROM CONTINUAL NEGLECT.

SIZE OF THE FEDERAL INFLUENCE

THE ADMINISTRATIVE PROCEDURE ACT OF 1946 WAS CHARACTERIZED IN A FLOOR REMARK BY U.S. SENATOR McCARRAN (12 MARCH 1946) AS A "BILL OF RIGHTS FOR THE HUNDREDS OF THOUSANDS OF AMERICANS WHOSE AFFAIRS ARE CONTROLLED OR REGULATED IN ONE WAY OR ANOTHER BY AGENCIES OF THE FEDERAL GOVERNMENT". STILL, THE CONGRESS DID NOT ENVISION, AT THAT TIME, THE EXPLOSION IN THE SIZE AND THE CATEGORIZATION OF THE FEDERAL ASSISTANCE SYSTEM. I'M ALSO SURE THAT CONGRESS DID NOT ENVISION THE BIRTH AND GROWTH OF THE SYSTEM OF ENFORCEMENT OVER VARIOUS HEALTH, SAFETY AND ENVIRONMENTAL MATTERS WHICH OCCURRED IN THE 1970s. THE HUNDREDS OF THOUSANDS OF ANNUAL, DOMESTIC CONTRACTS, AGREEMENTS, AND OTHER RELATIONSHIPS THAT NOW ARISE FROM OUT OF THIS RAPID GROWTH SINCE 1946, SIMPLY DID NOT EXIST WHEN CONGRESS SOUGHT TO ESTABLISH MINIMUM ESSENTIAL RIGHTS AND PROCEDURES FOR THOSE AFFECTED. THE FEDERAL INTERESTS ENCOMPASSED BY ALL THESE CONTRACTS AND ARRANGEMENTS ARE ACTUALLY CARRIED OUT, FOR THE MOST PART, THROUGH THE PROCEDURES AND OPERATIONS OF STATE AND LOCAL GOVERNMENTS ACTING UNDER THE MANDATES AND CONDITIONS OF FEDERAL FUNDING. REGULATORY COMPLIANCE COSTS ATTRIBUTABLE TO STATE AND LOCAL OPERATION OF THE CLEAN AIR ACT, CLEAN WATER ACT, WASTE MANAGEMENT, AND OTHER HEALTH, SAFETY AND WORK PLACE SAFETY REGULATIONS, WHEN ADDED TO THE $90 BILLION IN CONTRACTS, GRANT AND LOAN PROGRAMS, AMOUNTS TO A MEASUREMENT OF INFLUENCE OVER AMERICANS PROBABLY EXCEEDING GROSS COSTS OF $120 BILLION EACH YEAR. THE SIZE OF THE INTERGOVERNMENTAL SYSTEM IS HUGE. IT CAN NOT BE IGNORED FOR MUCH LONGER. ESPECIALLY NOW, DURING A TIME OF FEDERAL, FISCAL RETRENCHMENT WHEN THERE WILL BE FEWER RESOURCES AVAILABLE TO OVERCOME THE EFFECTS OF CATEGORIZATION AND OVERREGULATION.

RULEMAKING AND FEDERALISM

FEDERAL RULEMAKING IN THE INTERGOVERNMENTAL SYSTEM IS OF SERIOUS CONCERN TO THOSE AFFECTED. THE FEDERALISM SYSTEM IS A THREE PARTY SYSTEM IN WHICH THE GOVERNMENTS ACT IN A TWO PARTY, COOPERATIVE FASHION TO MAINTAIN SERVICES AND ASSISTANCE FOR PEOPLE, SHARED CITIZENS UNDER OUR REPUBLICAN FORM OF GOVERNMENT [ARTICLE IV, SECTION IV OF THE U.S. CONSTITUTION REQUIRES THAT THERE BE A REPUBLICAN FORM OF GOVERNMENT IN EACH STATE]. THE SECOND PARTY IN AGREEING TO THESE RELATIONSHIPS IS SIMPLY EXPRESSING AN ACKNOWLEDGEMENT OF MUTUAL INTEREST, WHILE THE THIRD PARTY IN THIS SYSTEM IS PROVIDED LEGAL RECOURSE BEFORE BOTH. CONGRESS SHOULD REALIZE THAT THE SECOND PARTY IN THIS SYSTEM, HOWEVER, IS UNDER INTENSE FISCAL AND POLITICAL PRESSURES, NOT THE LEAST OF WHICH STEMS FROM THEIR COOPERATION IN THE HUNDREDS OF CATEGORICAL ASSISTANCE AND REGULATORY PROGRAMS, ALL AMPLY PRESCRIBED BY FEDERAL RULES.

EFFECTS ON SUBSTANTIVE RIGHTS AND OBLIGATIONS

REGULATIONS CREATE OR EFFECT THE INTERGOVERNMENTAL PROCESS BY SUBSTANTIVELY PRESCRIBING THE WAY THINGS ARE TO BE DONE (THIS IS ESPECIALLY TRUE FOR MANY BROADLY WRITTEN FEDERAL STATUTES). FEDERAL REGULATIONS CAUSE A RESOURCE DEMAND ON STATE AND LOCAL TREASURES, THEY REQUIRE ORGANIZATIONAL STRUCTURES COMPATIBLE WITH THEIR PURPOSES, THEY CREATE OR CAUSE STATE AND LOCAL GOVERNMENTS TO AMEND THE GUIDELINES AND REGULATIONS UNDER WHICH THEIR OFFICIALS OPERATE, AND THEY OFTEN AFFECT THE ACTUAL LAWS OF THESE GOVERNMENTS. THE SECOND PARTY IN THIS SYSTEM IS SIMPLY CONCERNED THAT THE WIDE DISCRETION TO RULE AND TO INTERPRET BE EXERCISED WITH CARE BY FEDERAL AGENCY OFFICIALS IF SUCH ACTIONS, PROSPECTIVELY, ARE TO INVOLVE STATE AND LOCAL GOVERNMENTS.

STATE AND LOCAL GOVERNMENTS FIND THEMSELVES BETWEEN A ROCK AND A HARD PLACE. IF A GOVERNMENT DOES NOT MEET THE CONDITIONS OF FEDERAL FUNDING, FUNDS CAN BE WITHDRAWN AND SERVICES AND ASSISTANCE DENIED TO PEOPLE. SOME FEDERAL LEGISLATION EVEN PROVIDES ACCESS TO OBLIGATED FUNDS FOR WITHDRAWAL AS A SANCTION FOR NON-PERFORMANCE UNDER ITS PROVISIONS. ON THE OTHER HAND, STATE AND LOCAL GOVERNMENTS, AND THEIR OFFICIALS, FIND THEMSELVES TO BE TARGETS OF THIRD PARTY SUITS STEMMING FROM THESE SAME CONDITIONS. SUCH SUITS HAVE DEFINED NEW RIGHTS FOR THIRD PARTIES AND NEW OBLIGATIONS FOR STATE AND LOCAL GOVERNMENTS.[1] FEDERAL STATUTE AND FEDERAL REGULATION CREATE FISCAL OBLIGATIONS, OR LIABILITIES, FOR STATE AND LOCAL GOVERNMENTS. REGULATION CAN ALSO CREATE CIVIL LIABILITIES FOR STATE AND LOCAL OFFICIALS. YET, THROUGH THE FEDERAL PROCESS OF GENERALLY APPLICABLE RULEMAKING, THE CONDITIONS UNDER WHICH STATE AND LOCAL GOVERNMENTS OPERATE CAN CHANGE AT ANY TIME WITHOUT SUBSTANTIVE NEGOTIATION BETWEEN THE SOVEREIGN GOVERNMENTS AND WITHOUT ASSURANCE OF FISCAL REMEDY OR APPROPRIATE LEGAL RECOURSE. THIS ONESIDED RELATIONSHIP LOOKS LIKE A PRETTY BAD BARGAIN FOR ANY SECOND PARTY. FOR STATE AND LOCAL GOVERNMENTS, WHO ARE ONLY TRYING TO SERVE THEIR CITIZENS, IT IS A FRUSTRATING EXPERIENCE.

DISPUTES AND APPEALS

IT MAY BE A MORE FRUSTRATING EXPERIENCE TO HAVE A DISPUTE OR APPEAL ON AN ORDER, DETERMINATION, WITHDRAWAL, OR INTERPRETATION BASED ON THE AGENCY'S OWN REGULATIONS. THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (ACUS) AND THE U.S. OFFICE OF MANAGEMENT AND BUDGET (OMB) BOTH HAVE EFFORTS UNDERWAY TO ADDRESS THE LACK OF DISPUTE AND APPEALS PROCEDURES WITHIN THE FEDERAL COMMUNITY. NOT ONLY IS THERE AN APPARENT LACK OF CONCERN ABOUT ANY TWO PARTY NATURE IN THE INTERGOVERNMENTAL SYSTEM, ALLOWING FEDERAL AGENCIES TO CHANGE CONDITIONS IN MID-STREAM, AND A COMPLETE EXCLUSION FROM NOTICE REQUIREMENTS OF A NEED TO DISCUSS OR PAY ATTENTION TO THE EXERCISE OF GOVERNMENTAL POWERS BY A STATE OR LOCAL GOVERNMENT BUT - - IF YOU HAVE A DISPUTE OR AN APPEAL - - THERE IS NO

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[1] Let me refer you to the 11 March 1981, testimony of Mr. Thomas J. Madden, Esquire, before the Senate Subcommittee on Intergovernmental Relations hearings on "grant law" for the supporting arguments for this conclusion.

STANDARD PLACE TO GO, OFTEN TOO FEW POINTS TO REBUT, AND NO UNIFORM PROCEDURES OR GUIDELINES TO FOLLOW IN ORDER TO PREPARE YOUR CASE IN DISPUTE. WITH THIS BEING THE SITUATION, I SEE NO MINIMUM ESSENTIAL RIGHTS ACCORDED TO THE FORGOTTEN SECOND PARTY, A STATE OR A LOCAL GOVERNMENT.

THIS LACK OF ADMINISTRATIVE DISPUTE AND APPEAL PROCEDURES AT THE FEDERAL LEVEL MUST CONTRIBUTE TO THE COMPLEXITY AND INEFFICIENCY IN THE INTERGOVERNMENTAL SYSTEM. WITHOUT COMMON GUIDELINES AND PRACTICES ACROSS THE GOVERNMENT, DETERMINATIONS AND ARGUMENTS ARE NOT EASILY TRANSFERABLE, HENCE WHEELS ARE CONSTANTLY BEING REINVENTED. THIS ALSO CONTINUES THE FULL DISCRETION OF FEDERAL AGENCY OFFICIALS TO ADOPT THE TECHNIQUES MOST AMENABLE TO THEIR RESOURCES AND INTERESTS WHEN THEY GET A COMPLAINT. SINCE FEDERAL AGENCIES ARE ACCORDED A FIRST JURISDICTION ON MOST DISPUTES, THE BURDEN PLACED UPON THE NON-FEDERAL PARTY CAN BE UNFAIR. WITH THIS IN MIND, CONGRESS SHOULD PROBABLY CONSIDER ESTABLISHING CLEAR GUIDELINES AND DIRECTIONS TO THE FEDERAL COMMUNITY FOR DISPUTE RESOLUTION PROCEDURES. CONGRESS SHOULD ALSO RECOGNIZE THAT THE CONSTITUTION PROVIDES RECOURSE TO THE SUPREME COURT WHENEVER A STATE OR ITS INSTRUMENTALITIES IS A PARTY TO A DISPUTE. ANY PROCEDURES SHOULD ENCOURAGE RESPONSIBLE AND UNIFORM INFORMAL TECHNIQUES AS WELL AS RECOURSE FOR STATE AND LOCAL GOVERNMENTS TO MORE FORMAL TECHNIQUES, PERHAPS AT THEIR ELECTION, WHERE THEY MAY BE ACCORDED DUE PROCESS AND COMMON PROTECTIONS. CONGRESS MAY FIND THE EXPERIENCE OF THE GRANT APPEALS BOARD AT THE DEPARTMENT OF HEALTH AND HUMAN SERVICES A USEFUL RESOURCE IN COMBINATION WITH THE WORK OF OMB AND ACUS.

NOTICE REQUIREMENTS

SECTION 553 OF TITLE 5 U.S.C. WILL APPLY TO ALL RULEMAKING EXCEPT THOSE PERTAINING TO MILITARY OR FOREIGN AFFAIRS, INTERNAL PERSONNEL RULES, AND INTERPRETIVE RULES WHICH DO NOT HAVE A SUBSTANTIAL DIRECT IMPACT ON THE SUBSTANTIVE RIGHTS OR OBLIGATIONS OF PERSONS AFFECTED. IT SEEMS CLEAR TO ME THAT ANY REQUIRED CHANGE TO THE LAW, ORGANIZATION, OR FISCAL AFFAIRS OF OTHER GOVERNMENTS IS DIRECT AND SUBSTANTIVE IN NATURE, ESPECIALLY AS IT MAY REQUIRE NEW TAXES OR THE EXERCISE OF POLITICAL WILL.

THE APPLICABILITY OF 553 TO NEW AREAS OF CONTRACT, LOAN, GRANTS AND BENEFITS IS NOT CLEAR WITHIN THE UNGUIDED INTERGOVERNMENTAL SYSTEM. CONGRESS SHOULD ATTEMPT TO BRING MORE GUIDANCE AND DIRECTION TO THE RULEMAKING LEVEL, WHERE MUCH OF THE ACTION OCCURS. IN MY VIEW, AGENCY PROGRAM GUIDEBOOKS AND PAMPHLETS WHICH DO MORE THAN GUIDE, BUT ACTUALLY REQUIRE STATE AND LOCAL GOVERNMENT OFFICIALS TO DO SOMETHING, SHOULD BE SUBJECT TO NOTICE AND COMMENT UNDER 553. I ALSO FEEL THAT LETTERS AND MEMORANDA FROM FEDERAL OFFICIALS WHICH DETERMINE HOW A PROGRAM IS TO BE APPLIED IN A GENERAL FASHION SHOULD ALSO BE BROUGHT OUT INTO THE OPEN. CONGRESS SHOULD NOTE FOR THE AGENCIES THAT REGULATORY ACTIONS WHICH AFFECT THIRD PARTY RIGHTS BY CREATING OBLIGATIONS AND LIABILITIES FOR STATE AND LOCAL GOVERNMENTS (THROUGH A PASSTHROUGH OF EFFECT) ARE NOT TO BE DONE WITH INDIFFERENCE. IN MANY CASES IN THE INTERGOVERNMENTAL AREA, CONGRESSIONAL INTEREST WILL NOT BE MET IF TERMS AND CONDITIONS ARE SO PRESCRIPTIVE OR BURDENSOME THAT THE SECOND PARTY REFUSES TO PARTICIPATE.

A NOTICE OF FUND AVAILABILITY WHICH SUBSTANTIVELY PRESCRIBES THE MANNER IN WHICH APPLICATIONS ARE TO BE SUBMITTED IS AN ACT OF RULEMAKING, PARTICULARLY FOR THOSE CALLING FOR PLANS WHICH DETAIL THE SUBSEQUENT LEVELS OF SERVICES OR THE ALLOCATION OF RESOURCES UNDER ANY FEDERAL AWARD. PROGRAM REGULATIONS SHOULD TREAT FORMULA BUILDING AS PART OF THE RULEMAKING REQUIRING A DESCRIPTION AND AN IDENTIFICATION OF ANY DATA AND OTHER INFORMATION TO BE RELIED UPON BY THE AGENCY. I WOULD ALSO ENCOURAGE THE FEDERAL EXECUTIVE TO ADOPT A PRACTICE WHERE THE NOTICE ITSELF WOULD CONTAIN AN INDICATION THAT IT MAY HAVE EFFECT UPON A STATE OR LOCAL GOVERNMENT (STANDARD INDUSTRIAL CLASSIFICATION CODING MIGHT BE APPLICABLE) TO BE USED, AS A FINDING AID, BY POLICY MAKERS IN THE STATES, IN CONGRESS, AND IN THE EXECUTIVE WHO WOULD BE CONCERNED ABOUT CHANGES IN THE AMOUNT OF REGULATIONS BURDENING THE INTERGOVERNMENTAL SYSTEM. FOR EXAMPLE, ANNUAL CALENDARS ADDRESSING THE INTERGOVERNMENTAL SYSTEM COULD BE EASILY COMPILED.

WITHOUT CLEAR DIRECTION TO THE FEDERAL AGENCIES ON WHAT THEY ARE TO ASSESS OR CONSIDER WHEN THEY ARE RULEMAKING WITH EFFECT ON THE INTERGOVERNMENTAL SYSTEM, THE CONFLICTS WHICH HAVE ARISEN BECOME EXACERBATED. FEDERAL AGENCIES NEED TO HAVE A HIGHER LEVEL OF CONSIDERATION ADDRESSED TO THE EFFECT OF THEIR ACTIONS UPON THE LAW, REGULATIONS, FISCAL AFFAIRS, AND ORGANIZATION OF STATE AND LOCAL GOVERNMENTS. FEDERAL AGENCY DETERMINATIONS SHOULD CLEARLY SET OUT THE ROLES OF ANY INVOLVED GOVERNMENTS. THEY SHOULD CLEARLY SET OUT THE EFFECT OF THEIR PROVISIONS AS A BASIS FOR THEIR CONCLUSIONS, AND THEY SHOULD CLEARLY SPECIFY THE CONDITIONS WHICH COOPERATING GOVERNMENTS MUST PASS THROUGH TO THEIR EMPLOYEES, CONTRACTORS AND SUBGRANTEES. IN NO CASE SHOULD THEY BE ALLOWED TO BE TOTALLY SILENT ABOUT GOVERNMENTAL EFFECTS AS THIS IS A FORM OF PRESUMPTION ADDING CONSIDERABLE WEIGHT TO THE VALIDITY OR DEFERENCE GENERALLY ACCORDED THEM NOW. SUCH DETERMINATIONS AND CONCLUSIONS SHOULD CERTAINLY BECOME PART OF ANY RULEMAKING RECORD AS A WHOLE, THOUGH I WOULD MUCH PREFER THAT THE ADEQUACY OF SUCH ASSESSMENTS AND CONCLUSIONS IN THEIR OWN RIGHT BECOME JUDICIALLY REVIEWABLE.

CLARIFICATION OF THE FEDERAL ADVISORY COMMITTEE ACT

H.R.746, THE REGULATORY PROCEDURE ACT OF 1981, SETS OUT THAT AGENCIES SHALL HAVE PROCEDURAL GUIDELINES FOR RULEMAKING, TO INSURE THAT "THERE IS FULL CONSULTATION WITH AFFECTED STATE AND LOCAL GOVERNMENTS" (LISTED IN A NEW SECTION 633 TO TITLE 5). THIS PROVISION IS SUPPORTED, IN GENERAL, BY STATE AND LOCAL GOVERNMENT INTEREST GROUPS AND I WOULD URGE THE SENATE TO ADOPT A SIMILAR POSITION WITHIN S.1080. THE NON-NEGOTIATED ASPECT OF THE PRESENT SYSTEM OF RULEMAKING IS A BAD BARGAIN FOR ANY SECOND PARTY. IN GENERAL, IT LEADS TO ILL-WILL AND POOR PERFORMANCE. UNFORTUNATELY, PROVISIONS OF THE FEDERAL ADVISORY COMMITTEE ACT (5 U.S.C. APPENDIX I) INTRUDE ON THE GOOD INTENTIONS IN THE HOUSE BILL. THIS ACT SHOULD BE CLARIFIED TO REMOVE ITS BURDENSOME PROCEDURAL ASPECTS, PERHAPS TO ALLOW AGENCIES TO WAIVE ITS PROVISIONS WHEN THE PURPOSE OF ANY MEETING IS SPECIFICALLY FOR THE FORMULATION OF RULES TO FALL UNDER 5 U.S.C. 553. CONGRESS SHOULD ALSO DIRECT THE INTERPRETATION OF "STATE AND LOCAL GOVERNMENTS" TO INCLUDE ELECTED OFFICIALS, THEIR STAFFS, AND REPRESENTATIVES.

EFFECTIVE DATE CLARIFICATION

THE INTERGOVERNMENTAL SYSTEM COULD BE SIMPLIFIED AND STREAMLINED FOR ALL PARTIES IF THE GENERALLY APPLICABLE RULEMAKING AUTHORITY OF THE AGENCIES WERE TO BE CONSTRAINED, UNLESS THERE IS CLEAR DIRECTION FROM STATUTE, LAW, OR COURT ORDER OTHERWISE, FROM APPLYING RETROACTIVE EFFECT ON EXISTING AGREEMENTS WITH STATE AND LOCAL GOVERNMENTS. SUCH A LIMITATION WOULD REMOVE THE ONESIDED ASPECT OF THE AGREEMENTS, CREATE A CLEAR PATH FOR PROGRAM EXECUTION WITHOUT CHANGES IN MID-STREAM, PROTECT THE FISCAL AFFAIRS AND GOVERNMENTAL POWERS OF STATE AND LOCAL GOVERNMENTS FROM CONTINUING INTRUSION AND MIGHT EVEN SAVE MONEY FOR THE FEDERAL BUREAUCRACY. SUCH A LIMITATION CAN BENEFIT THIRD PARTY RIGHTS AS WELL, SINCE THE CONDITIONS OF FEDERAL FUNDING COULD BE KNOWN WITH CERTAINTY FOR THE DURATION OF ANY AGREEMENT BETWEEN THE GOVERNMENTS. SUCH A PROVISION WOULD NOT LIMIT THE SUBSTANCE OF AGENCY AUTHORITY, IN FACT, AGENCIES COULD PERFORM THE NOTICE AND COMMENT AT ANY TIME BUT THE EFFECTIVE DATE IN SOME CASES WOULD BE DELAYED UNTIL THE EXISTING AGREEMENT HAS ENDED AND NEW OFFERS PRESENTED (FOR EXAMPLE, AT THE ACCEPTANCE OF THE NEXT STATE PLAN REVISION). I WILL ALSO NOTE THAT THE USE OF RULEMAKING OF GENERAL APPLICABILITY TO HAVE EFFECT ON PARTICULAR AGREEMENTS CONTAINS A CONSIDERABLE AMOUNT OF ILLOGIC AND IS BASICALLY UNFAIR. OF COURSE, ANY REGULATORY CHANGE NOT OTHERWISE REQUIRED COULD BECOME EFFECTIVE IF IT IS AGREED TO BY THE AFFECTED STATE OR LOCAL GOVERNMENT.

PASSTHROUGH AND PRIMARY JURISDICTION

THE PROCEDURES AND REQUIREMENTS OF THE APA SHOULD NOT BE CONSTRUED AS COMMANDING THE ENTIRE FIELD OF ADMINISTRATIVE LAW AS SOON AS SECTION 553 APPLIES TO GRANTS, BENEFITS, LOANS, AND SO FORTH. AT LEAST 38 STATES HAVE THEIR OWN ADMINISTRATIVE PROCEDURE LAWS OR GENERAL PRACTICES. THE FEDERAL APA SHOULD NOT BE CONSTRUED TO HAVE AN EFFECT ON SUCH LAWS, AND SHOULD NOT BE APPLIED TO PREEMPT THE EXERCISE OF THIS LEGAL AUTHORITY EVEN FOR THOSE STATE AND LOCAL RULEMAKINGS WHICH MAY BE NECESSARY TO MEET THE CONDITIONS OF FEDERAL FUNDING. THESE RULEMAKINGS BY STATE OFFICIALS, FOR EXAMPLE, STILL MUST MEET THE STATE'S OWN LAWS OF PROCEDURE.

EVEN WHEN A STATE OR LOCAL GOVERNMENT OPERATES UNDER THE MANDATES AND CONDITIONS OF FEDERAL FUNDS ITS OFFICIALS ACT UNDER THE AUTHORITY CONFERED BY THEIR OWN LAWS AND CONSTITUTIONS. ANY ADMINISTRATIVE CHALLENGE OR DISPUTE ARISING FROM THE ACTIONS OF THESE OFFICIALS SHOULD BE SUBJECT TO THE ADMINISTRATIVE PROCEDURES OF THE AUTHORIZING GOVERNMENT. SHOULD A FEDERAL AGENCY WISH TO ASSUME PRIMARY JURISDICTION IN ANY SUCH CASE THEN IT SHOULD CLEARLY SET THIS OUT AS A CONDITION OF FUNDING, TO BE AGREED UPON BY THE STATE OR LOCAL GOVERNMENT. I WOULD HOPE THAT CONGRESS WOULD ADDRESS THIS AREA OF JURISDICTION TO CLARIFY THE EXTENT OF AUTHORITY THAT FEDERAL AGENCIES MAY EXERCISE AS ADJUDICATORS IN CASES OF THIRD PARTY DISPUTES AGAINST THE EXERCISE OF ANOTHER GOVERNMENT'S LEGAL AUTHORITIES. IT IS MY VIEW THAT FEDERAL AGENCIES MAY NOT ASSUME SUCH AUTHORITY IF SUCH A CONDITION HAD NOT BEEN CLEARLY SET OUT TO ALLOW A STATE OR LOCAL GOVERNMENT TO MAKE AN INFORMED CHOICE ON ACCEPTANCE.

IN CONCLUSION

REGULATORY REFORM LEGISLATION PENDING BEFORE THE CONGRESS WOULD BRING RULEMAKING APPLICABLE TO CONTRACTS, BENEFITS, GRANTS, AND LOANS WITHIN THE NOTICE AND COMMENT PROCEDURES AND PROTECTIONS OF THE ADMINISTRATIVE PROCEDURE ACT. THIS IS A NECESSARY FIRST STEP TOWARD FILLING A RATHER LARGE VACUUM IN LAW AND IN INTERGOVERNMENTAL RELATIONS. CONGRESS SHOULD ACT TO CLARIFY THE FULL MEANINGS OF SUCH A FUNDAMENTAL STEP AND MAKE THE CHANGES IN LAW THAT WILL MAKE THIS A USEFUL REFORM. OTHERWISE, THERE IS A GREAT POTENTIAL FOR SUITS AND CLAIMS FOR CLARIFYING JUDGEMENTS.

UNDER THE PRESENT SYSTEM, FEDERAL AGENCIES MAINTAIN BROAD DISCRETIONARY AUTHORITIES WHEN RULEMAKING IN THE GOVERNMENTAL AREA. PRESUMPTIVE VALIDITY, PRIMARY JURISDICTION, AND THE LACK OF COMMON ADMINISTRATIVE PROCEDURES NOW GIVE FEDERAL BUREAUCRATS A STRANGLE HOLD OVER STATE AND LOCAL GOVERNMENTS, THEIR LAW, REGULATIONS AND FISCAL AFFAIRS. A CLARIFICATION OF PRINCIPLES WITH REGARD TO THESE FEDERAL AGENCY ADMINISTRATIVE PROCEDURES CAN FREE UP THE LEVELS OF GOVERNMENT FROM MUCH UNCERTAINTY AND ALLOW THEM TO EXERCISE THEIR AUTHORITIES IN AN UNBURDENED, COOPERATIVE MANNER TO PROVIDE SERVICES AND ASSISTANCE TO PEOPLE.

ON APRIL 20, 1981, THE U.S. SUPREME COURT DECIDED THE CASE OF PENNHURST STATE SCHOOL AND HOSPITAL ET AL. VERSUS HALDERMAN ET AL.(NUMBER 79- 1404). AT ISSUE IN THIS CASE WAS THE SCOPE AND MEANING OF THE DEVELOPMENTALLY DISABLED ASSISTANCE AND BILL OF RIGHTS ACT OF 1975. JUSTICE REHNQUIST IN WRITING FOR THE MAJORITY ADDRESSED THE SPENDING POWER OF THE CONGRESS:

> "Turning to Congress' power to legislate pursuant to the Spending Power, our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States.... The legitimacy of Congress' power to legislate under the Spending Power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract."... Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. (page 13)

> "The crucial inquiry, however, is not whether a state would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the State could make an informed choice.... Though Congress' power to legislate under the Spending Power is broad, it does not include surprising the States with post-acceptance or "retroactive" conditions." (page 21)

PENNHURST RAISES DOUBTS EVEN ABOUT THE APPLICATION OF A GRANT STATUTE BEYOND THE BASIC CONCEPTS OF CONTRACT LAW. WHAT DOES THIS MEAN FOR RULEMAKING? WHETHER IN THE GOVERNMENTAL SYSTEM OR FOR ECONOMIC REGULATION, FEDERAL AGENCIES WHEN RULEMAKING SURELY MUST BE HELD TO A VERY HIGH STANDARD OF CONSIDERATION WITH REGARD TO THE SUBSTANTIVE RIGHTS AND OBLIGATIONS OF AFFECTED PERSONS. MINIMUM ESSENTIAL RIGHTS AND PROCEDURAL PROTECTIONS HAVE CLEARLY BEEN AVAILABLE SINCE 1946 TO THOSE AFFECTED BY ECONOMIC REGULATION. THIS IS NOT THE CASE IN THE GOVERNMENTAL SYSTEM, HOWEVER, WHERE TERMS AND PRINCIPLES OF CONDUCT ARE STILL BEING STUDIED FOR THEIR MEANING. REGULATORY REFORM LEGISLATION NOW PROVIDES AN OPPORTUNITY TO PROVIDE CLEAR AND FORCEFUL GUIDELINES AND DIRECTIONS FOR THE FEDERAL AGENCIES' STANDARDS OF CONSIDERATION WHEN RULEMAKING WITH EFFECT ON STATE AND LOCAL GOVERNMENTS. IT IS AN OPPORTUNITY WHICH SHOULD NOT BE LOST.

PRESIDENT REAGAN HAS ALSO ADDRESSED THE TOPIC OF FEDERAL RULEMAKING WITH EFFECT ON STATE AND LOCAL GOVERNMENTS IN A LETTER TO THE CHAIRMAN DATED JUNE 3, 1981. I BELIEVE THAT HIS COMMENTARY IS ACCURATE AND APPROPRIATE:

> "Too often, I feel, Federal officials fail to assess the impact of the various rules they put into place. And, as intermediaries between the citizens receiving the benefits of Federal assistance and the Federal program that gives the aid, state and local governments are levied with Federal procedural and administrative burdens that are excessive and costly. We cannot forge a new federalism if we fail to address the substantial body of Federal requirements that frequently impede state and local officials from taking effective action." (Excerpted from Senate Report No. 97-136, page 59)

AGAIN, I WOULD LIKE TO THANK THE CHAIRMAN AND THE COMMITTEE FOR THE OPPORTUNITY TO PRESENT THESE REMARKS.

JOINT COMMITTEE ON ADMINISTRATIVE RULES
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June 19, 1981

The Honorable
William W. Roth, Jr., Chairman
Senate Committee on Governmental
Affairs
U.S. Senate
Washington, D.C. 20510

ATTENTION: Mr. Link Hoewing, Professional Staff

Dear Senator Roth:

This letter and the attached comments are being submitted for inclusion in the hearing record on S.1080, the Regulatory Reform Act. We appreciate the request to submit these comments and hope that they will be useful in the Committee's consideration of this important legislation.

While the attached comments present detailed suggestions and criticisms of the issues being considered, let me highlight several of those issues here. Most important, from our perspective, are the intergovernmental issues which are discussed on pages 5 and 6 of the attached comments.

The relationship between federal agency rules and state laws, rules and programs is complex and often difficult to unravel. Federal rules sometimes make funding for specific state programs contingent on certain regulatory rulemaking actions by state agencies. Often, state plans, sometimes including plans for adopting regulations, must be submitted for federal agency approval and are frequently adopted by federal agencies in rulemaking actions (for example, state implementation plans under the Clean Air Act). Frequently, federal agencies impose requirements on states through program guidance booklets or even through informal discussions at the regional office level. Congress needs to clarify that program booklets are rules if they impose requirements, regardless of what they are called.

The recent article by Professor Brown, "Federal Funds and National Supremacy: The Role of State Legislatures in Federal Grant Programs" (28 American University Law Review 279), highlights the basic issues involving federal-state relations in grant programs. Many of his arguments can be applied with equal force to federal-state relationships in regulatory programs; grants and rules are frequently inseparable. Brown's statement that "a highly complex and totally inconsistent body of case law on the state legislative role in federal grant programs is emerging" (208) can also be applied to federal requirements for state regulatory action. Several of his conclusions are worth quoting in this context:

> Even though the national interest in the administration of a grant program is strong, it is not strong enough to justify the use of federal grants to substantially alter the balance of power between state legislatures and governors.... Grants are a partnership between independent entities of government. If the national government wants programs to be conducted in a manner that conflicts with state legislative authority, Congress has the option of choosing mechanisms other than grants-in-aid. (312-313)

Federal agencies imposing requirements for state agency regulatory actions pose a similar question: Is the national interest strong enough to justify the use of federal authority to substantially alter the balance of power between state legislatures and governors? Such requirements frequently attempt to vest broader regulatory powers in state agencies at the expense of legislative control over the extent of such powers. Significantly, a National Conference of State Legislature's publication on legislative review of administrative regulations was entitled "Restoring the Balance."

We suggest in our comments three methods Congress should consider to address these serious intergovernmental issues. None of these methods are ideal; they would not solve all of the problems, but they would be significant steps in the right direction.

1. Federal "Self-Limitation" -- Congress should consider requiring agencies to specifically identify and consider the effects of regulations on state regulatory programs. The Regulatory Flexibility Act, which required agencies to consider the effects of regulations on small businesses, could serve as a model for implementing this suggestion.

2. Tracking System -- Some method of tracking which specific state regulatory programs will be affected by federal changes in regulations should be developed. Congress should consider requiring agencies to specifically inform states of regulations and changes in regulations which will affect state programs. A set of requirements for "intergovernmental rules" could be developed paralleling the proposed requirements for "major rules."

3. Monitoring Role for ACIR -- Congress should consider authorizing the Advisory Commission on Intergovernmental Relations to monitor federal regulations affecting state regulatory programs. This suggested role might parallel the role of the Small Business Administration under the Regulatory Flexibility Act.

An additional issue which should be mentioned is the need for a clarification of the Federal Advisory Committee Act in relation to consultation between federal and state officials. The current interpretation of the Act hinders effective advance consultation. States are in a unique position in being required to implement federal regulatory programs; that unique position should be recognized in the Act.

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June 19, 1981

Thank you again for the oppotunity to submit these views and comments. We hope they will be useful. We will be happy to provide any clarifications or additional information which you may find necessary. I remain

Yours faithfully,

Pres Bloom

Senator Prescott E. Bloom
Chairman

PEB:plb
Attachment
cc: Honorable Robert McClory
Honorable Robert Michel
Honorable Charles Percy
Ms. Judy Peachee

COMMENTS ON U.S. SENATE REGULATORY REFORM LEGISLATION

The comments and suggestions offered in this memorandum are based on our experience during the past several years developing, implementing, and refining the Illinois Administrative Procedure Act with its vigorous approach to legislative oversight of the rulemaking agencies of state government. Many of the procedural questions and issues we have wrestled with are being addressed in bills at the national level. In addition, our experience in reviewing state rules mandated by federal rules provides us with a unique view of some of the serious intergovernmental issues involved. We hope that these comments will be useful as the Congress considers these bills.

This memorandum presents comments at three levels. First, some general comments on five common issues are presented. These five issues seem to be the key issues which Congress will need to resolve to reach a consensus on comprehensive regulatory reform legislation. Then, comments on each of the three bills we examined are presented. The substantive comments on these bills represent the second level of analysis. Technical comments represent the third level of analysis. The second level comments are the most detailed and we anticipate that they will be most valuable in refining the specific legislation which is being considered. A copy of the Illinois Administrative Procedure Act is appended to this memorandum for reference.

COMMON ISSUES

Five key issues have special importance in the development of federal regulatory reform legislation. These issues will need to be addressed by Congress if comprehensive regulatory reform legislation is going to be passed. These issues concern (1) legislative veto provisions, (2) cost/benefit analysis, (3) role of the courts, (4) sunset and rule review, and (5) intergovernmental effects of regulations. Comments based on Illinois' experience during the past several years will be presented on each of these issues.

1. Legislative Veto Provisions

One of the key issues Congress will be considering is whether or not the regulatory reform legislation should have a general legislative veto provision. Such a provision would allow the Congress in some way to disapprove proposed regulations when it found that they were undesirable. Since federal law currently has a number of legislative veto provisions in specific statutes, this is not a major innovation, but it would be a significant extension of these provisions.

A number of state legislatures have found general legislative veto authority over regulations proposed by state agencies to be effective as a means of insuring continuity between legislative and executive policy-making. In Illinois, a legislative veto provision was added to the Administrative Procedure Act in 1980, when members of the Joint Committee on Administrative Rules and other legislators became convinced that agencies were not being responsive to the advisory objections which the Joint Committee had been issuing. The veto authority has not been utilized, but the existence of the authority seems to be having the desired effect of increasing the responsiveness of agencies to the advisory objections. Maintaining some means of effectively commenting on and changing agency rules short of actually vetoing them is an important principle. We would suggest that any federal regulatory reform legislation which is developed include some explicit procedure for the Congress, or a congressional committee, to publicly express its points of disagreement with proposed rules short of an actual veto.

If the Congress decides to include a legislative veto mechanism, two principles should be kept in mind. (1) The legislative branch should have a means of vetoing regulations which has less formality than a bill. Allowing the Congress to veto a regulation by bill adds no power to the legislative branch, since it is axiomatic that a statute can be passed to supersede a regulation. Although a single chamber resolution may not be appropriate, a joint resolution requiring the approval of the President has no advantages over a bill. In Illinois and most other states, intermediate forms do exist between single chamber resolutions and actual legislation. (2) Specific standards for the legislative veto action should be provided. Congress should not be given unbridled authority to veto any regulation which may be unpopular or politically sensitive. These standards might include failure to fulfill statutory objectives, conflict with legislative intent, unnecessary economic costs, serious harm to the economy, or infringement on the rights of citizens. The standards are essential to ensure that the legislative veto authority is used properly.

2. Cost/Benefit Analysis

States have tried a wide variety of cost/benefit analysis requirements in their Administrative Procedure Acts. On one extreme, the State of Washington enacted a provision encouraging agencies to consider the economic effects of regulations, which was found to be too vague to be enforced. On the other extreme, Florida adopted a very comprehensive requirement, detailing numerous specific items which needed to be included in a cost/benefit analysis. The Florida requirement has been found to be excessive and is now undergoing a slow process of relaxation to ensure that agencies can comply without unreasonble costs.

Some middle ground seems most appropriate. The Illinois Administrative Procedure Act requires several simple items to be provided to the Joint Committee to assess the economic effects of the proposed rule. This information has not been as useful as it might be, but some progress has been made with this provision (see Section 5.01(b)).

The Reagan executive order and the indications that the Office of Management and Budget will be looking closely at proposed rules on a cost/benefit basis may reduce the need for including such a provision in the APA. The recent questions raised by the Office of Management and Budget about the costs and potential benefits of the Postal Service's proposed nine-digit zip code system indicates that the administration will be taking these efforts seriously. The only potential benefit of institutionalizing this process in the APA is to encourage greater public involvement in this analysis process.

Regardless of the specific form of the cost/benefit requirement, it is important that some central monitoring and oversight of the analysis process be provided. The Office of Management and Budget, the Congressional Budget Office, another congressional committee, or some other unit should have responsibility for insuring the consistency and accuracy of the analyses. Without some type of central monitoring, the provision is not likely to be very effective in actual practice.

3. Role of the Courts

Although courts have historically been involved in the review of agency regulations, a great deal of uncertainty exists as to the extent of judicial intervention in the rulemaking process. Although we have no direct experience on the issues involved in this area in Illinois, since there have been very few court cases involving the Illinois Administrative Procedure Act, we can highlight several principles for Congress' consideration. It is our opinion that clarification, rather than strengthening, would be most helpful on this issue.

First, courts have traditionally been very reluctant to overturn agency regulations, deferring to the expertise of the agency especially in technical or scientific areas. If the role of the courts in the regulatory process is to be increased, some explicit direction from Congress limiting the degree of deference to agencies will be necessary.

Most state courts also take a limited view of their ability to intervene in these issues, although few state legislatures have attempted to encourage judicial activism in this area. One innovative provision included in the Iowa Administrative Procedure Act requires a reversal of the burden of proof when the court challenge involves a rule objected to by a legislative oversight committee. Professor Arthur L. Bonfield is a strong proponent of this type of provision, viewing it as a viable alternative to the more popular legislative veto provisions.

A second point is that the role of the courts involves both procedural and substantive review of regulations. Courts ask both "Were these rules adopted properly?" and "Are these rules implementing the legislative intent of the authorizing statute?" Often courts seem to limit themselves to procedural review, ignoring substantive issues. Perhaps specific criteria could be enacted by Congress to guide judicial review of regulations, although the potential effectiveness of such criteria could be questioned.

4. Sunset and Rule Review

This set of questions is directly related to the discussion of legislative veto issues above. We feel that an effective legislative mechanism to consider and change agency regulations is essential to ensure proper legislative authority for law-making. As increasingly broad delegations of quasi-legislative authority to administrative agencies have been made and upheld, the legislative branch has lost effective control over much of its essential law-making function. Both sunset and rule review are procedures which could be used to reassert proper legislative authority over regulations.

The current assessment of the effectiveness of sunset mechanisms is that they have less potential for effective control over regulations than was initially thought. After the first surge of sunset programs, few additional states have adopted sunset programs in the past few years.

One difficult question faced in the adoption of these programs is what is to be sunsetted: agencies, statutes or regulations. Different sunset programs in the various states operate at each of these three levels. We would suggest that the most effective level would be a combination of statutes and regulations. Since the explicit connection between the authorizing statute and the regulations adopted under the statute is not always clear, particularly in instances in which statutes are broadly worded, some difficulties would arise with this approach as well.

Rule review programs at the state level seem to be most effective when they are assigned to a special unit without other responsibilities. The current congressional procedure which relies on substantive standing committees to review regulations issued within the committees' policy arena does not provide the comprehensive review which is necessary to identify overlapping and conflicting regulations. It also tends to become privatized, failing to gain input from the wide range of perspectives in the legislative body. Combining specialized review by substantive committees with review of all rules by a Joint Committee has been tried in Wisconsin and several other states. It might provide a workable model for Congress.

The seminal article "Regulation and the Political Process" by Cutler and Johnson in 1975 presents a cogent case for the need for legislative reassertion of control over rules and regulations issued by executive branch agencies. While their specific suggestions may not be workable, the need for vigorous congressional scrutiny is clear. An institutionalized rule review process would be an important step in that direction.

5. Intergovernmental Effects of Regulations

Numerous federal regulations require corresponding regulatory action by state agencies. Sometimes such action requires new rulemaking authority to be granted by the state legislature. Often, federal funding of related state activities is contingent on adoption of the prescribed regulations. This relationship is complex, confusing and cumbersome in many policy areas in which competing public values must be weighed. Attention needs to be given by Congress to means of ensuring that federal agencies do not undermine the integrity of a state's regulatory process by mandating costly or unnecessary requirements. Preventing such abuses of power should be a major goal of federal regulatory reform efforts.

Illinois, following the lead of California and several other states, has adopted a similar approach to its relationship with local units of government. The Illinois State Mandates Act prohibits the imposition of most types of requirements on local units of government, whether by statute, executive order or regulation, unless the need for the requirement is demonstrated and adequate funding is provided. This Act is likely to result in major changes in intergovernmental relations over the next several years. Some type of similar federal self-limitation should be considered.

One of the major difficulties in this area is the lack of any systematic method of identifying and tracking the relationships between federal statutes, federal regulations, federal grants, state statutes, state regulations, state programs, and state expenditures. The Regulatory Reform Committee of the National Conference of State Legislatures had laid an initial groundwork for a tracking system to identify these interrelationships, but this effort will involve a major project. Increased consideration of the effects of federal regulations on state laws, regulations and programs is a necessity to improve federal-state relationships.

A possible model to follow in implementing this type of suggestion might be the Regulatory Flexibility Act, which requires federal agencies to consider the impact of their regulations on small businesses. The most effective aspect of this legislation might be the use of the Small Business Administration to monitor agencies' compliance with the Act. The Advisory Commission on Intergovernmental Relations or the Administrative Conference might play a similar role in legislation requiring agencies to consider the impact of their regulations on state and local governments. The existence of some type of monitoring agency would be an important ingredient in making such a program effective. Both restructuring federal-state relationships and reforming the regulatory process are goals of the Reagan administration which could be advanced through this type of legislation. We would hope that the requirements could be stronger and more definite than those included in the Regulatory Flexibility Act.

LAXALT BILL

Substantive

1. Section 2 of the bill would amend 5 U.S.C. Section 551 and add as paragraph (16) a definition of the term "major rule." By this definition, "major rules" would include those having "an annual effect on the economy of $100,000,000 or more in direct and indirect enforcement and compliance costs." Because of the extreme difficulty agencies would encounter in determining "indirect enforcement and compliance costs," we suggest the deletion of that phrase from the definition. In the wake of

this deletion, it might also be appropriate to lessen the dollar amount mentioned, because the inclusion of indirect costs is probably one of the reasons that figure is currently so high.

2. Section 3 of the bill would substantially amend 5 U.S.C. Section 553. One of the changes would be the addition of subsection (b)(1)(C), which would exempt the following from the procedural requirements of Section 553:

> (any) interpretative rule, general statement of policy, or rule of agency organization, procedure or practice, other than an interpretative rule or general statement of policy that has general applicability and would have a substantial impact on the substantive rights of persons outside the agency. (Emphasis added)

As the law now stands, all interpretative rules, general statements of policy, and rules of agency organization, practice and procedure are exempt from compliance with subsection (b) of Section 553, and interpretative rules and statements of policy are also excepted from the provisions of subsection (d). Since the language underlined above clarifies the law and limits what agencies may do without notice and hearing, it is at least a step in the right direction. However, in our opinion it still allows too much agency action without public notice and public input. Another problem in this area concerns the adoption of conflicting policy statements and interpretations by different regions of the same agency. In our view, this problem might be ameliorated by a requirement that all general policy statements and interpretative rules be subject to general notice and hearing provisions and thus, that they be promulgated through the central agency office. (We are assuming that the term "person," as used in the above-quoted language, includes state and local governments as would seem to be required by 5 U.S.C. Section 551(2) and present case law. If this is not entirely clear, further statutory definition of the term "person" to include state and local governments would be in order. The Congress might also want to redefine "person" to exclude foreign governments to overrule the decision in Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769 (D.C.D.C., 1974).)

3. Section 3 of the bill would also add subsections (b)(1)(D) and (b)(2) to current 5 U.S.C. Section 553. Proposed (b)(1)(D) would exempt from compliance with Section 553 any

> rule for which the agency for good cause finds that notice and public comment are unnecessary due to the routine nature of the matter or the insignificant impact of the rule.

Proposed subsection (2) reads as follows:

> In the case of a rule for which an agency makes a finding under subparagraph (D) of paragraph (1) of this subsection, the agency shall publish the rule in the Federal Register with a statement of the finding of the agency under such subparagraph and the reasons therefor.

While we are aware that federal agencies promulgate many rules which are routine and arguably insignificant, we feel that these provisions would allow too much rulemaking to be done without notice and public comment, violating the spirit and purpose of the APA. Balancing the goals of keeping down the agency's cost of making routine rules and preventing misuse of these exemptions to the detriment of the public, it is our opinion that the above quoted portions of the bill should be eliminated. If it is decided that these exemptions should be kept, we would suggest that the phrase "for good cause" be deleted from (b)(1)(D); it adds little to the meaning of that provision, and has the potential for generating much confusion and litigation.

4. Section 3 of the Laxalt bill would further amend 5 U.S.C.A. Section 553 by creating subsection (b)(3), which sets forth requirements for agencies promulgating "emergency rules" (defined in Section 2 of the bill). From our point of view, there are several deficiencies in the provisions for emergency rules. First, although the publication of emergency rules is required, the bill is silent as to whether a rule may become effective before publication. It is our recommendation that the bill clearly set forth a provision whereby the effective date of each emergency rule may be established and made known.

Second, the bill provides that emergency rules "may not be effective longer than a reasonable period necessary to" comply with ordinary rulemaking procedures. Because of the vagueness of the term "reasonable," we feel that this provision could be abused by agencies seeking to avoid usual rulemaking procedures. As a result, it is our suggestion that agencies promulgating emergency rules be required to initiate the usually required rulemaking procedures within a specific period of time after the effective date of the emergency rules.

The third problem area we perceive in the bill's provisions for emergency rules is the lack of any frequency limitation. As it now stands the bill provides that emergency rules may remain effective for a "reasonable period." There is nothing prohibiting an agency from allowing an emergency rule to remain in effect until a court invalidates it (as having been in effect for longer than a reasonable period), and then promulgating a substantially similar rule to remedy this court-created "emergency." We suggest that Congress consider enacting language similar to the language in Section 5.02 of the Illinois Administrative Procedure Act.

5. Another change in current Section 553 contemplated by Section 3 of the Laxalt bill would be a requirement that the notice of proposed rulemaking in the Federal Register contain "the proposed provisions of the rule" (Proposed 553(c)(1)(C)). It is not clear whether the actual text of the proposed rule or just a general description of the rule's provisions would be required by this language. Therefore, we feel clarification is necessary. Furthermore, in light of our experience in Illinois, we suggest that proposed subsection (c)(1) contain requirements that rules which amend already existing rules indicate proposed changes in existing language and that repealers contain the full text of the repealed rule.

6. The Laxalt bill's Section 3 would also create subparagraph (E) of Section 553(c)(1), under which the notice of proposed rulemaking must include

> a description of the data, methodology, reports, studies, or other information upon which the agency intends to rely in the rulemaking, and of the purposes for which the agency plans to rely on such information, including an identification of the authors or source of such information.

The description contemplated by this subparagraph could run to hundreds of pages for some rules, and thus could become very cumbersome; it is our suggestion that a list of the materials relied upon be required instead of a description of all such materials. We note that agencies would be required by proposed Section 553(f)(1)(B) to keep copies of these materials, or information as to how they can be obtained, in the rulemaking file. We further note that the notice of proposed rulemaking would have to contain information as to how a copy of the rulemaking file may be obtained. We would suggest that information concerning how to obtain materials relied upon by the agency be published along with the list of the materials in the Federal Register. This would facilitate early public access to the materials, and might also obviate the need for proposed Section 553(f)(1)(B).

7. Nowhere in the Laxalt bill is it provided that agencies must consider each public comment submitted pursuant to Section 553. While it might be felt that this requirement is implicit in the statute, we feel that it should be spelled out.

8. Proposed Section 553(c)(2) concerns the promulgation of major rules, a subject which will be discussed in more depth below. We find the use of the term "adverse effects" in the subparagraphs (A), (D), and (E) of paragraph (2) troublesome because of its vagueness. We suggest that the term "adverse effects" be defined clearly so that agency personnel, the affected public and the courts will know what it means. One other term in paragraph (2) which may require clarification is "explanation of legal reasons," in subparagraph (E). We would suggest that a phrase such as "an explanation of reasons...accompanied by a memorandum of law supporting these reasons" be substituted.

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9. The Laxalt bill imposes a heavy burden on agencies adopting major rules. They would be required to do a number of things in addition to those things required of any agency promulgating any rule, including the following (citations are to proposed sections of Title 5, U.S.C.):

   - prepare and publish a "clearly articulated," detailed cost-benefit analysis of the proposed major rule "in as precise and succinct a manner as possible." (Section 553(c)(2) and (3))

- afford an opportunity for oral presentations of data and information, sometimes including cross-examination, all of which must apparently be transcribed. (Section 553(d)(3) and (f)(1)(D))

- make extra determinations, descriptions, and explanations. (Section 553(e)(1), (2), and (3))

√ In our estimate, agency compliance with the economic analysis requirement for major rules in the Laxalt bill would simply cost more than it would be worth. The experience of such states as Florida and Illinois has shown that it is often better not to expect highly detailed and accurate economic information from agencies, especially when requirements for the production of economic information are first being implemented. We would suggest that the bill impose economic analysis requirements on federal agencies similar to those imposed on state agencies by the Illinois Administrative Procedure Act (see Sections 7.04(5)a and 5.01(b)).

It should also be noted that while the Laxalt bill does require a detailed cost-benefit analysis containing both quantifiable and non-quantifiable factors (proposed Section 553(c)(2) and (3)), an inadequacy in the statements these provisions require would be subject to only limited judicial review (see proposed Section 553(f)(3)(i)). It is our opinion that the production of more limited economic information could be required and that such a requirement could be more stringently enforced by the courts. We thus feel that the more limited requirements would be the most efficient means to the best possible information at the present time. It is, of course, to be hoped that as agencies become more skilled in the collection of economic data and projection of economic costs and benefits, more detailed statements and analyses may be required by law at some time in the future. √

10. Proposed Section 553(c)(4) reads as follows:

> Any supplement to or modification or revision of the notice of proposed rule making that is significant shall be published by the agency in the Federal Register and shall contain the information required by this section.

This provision represents an important step toward the fulfillment of the goal of agency openness in the rule making process. However, this provision could be lessened to a requirement of publication of any change in a notice of proposed rule making that results from other than public input during the rule making process. It would be our suggestion that agencies be required to publish the notice of proposed rule making as supplemented, modified or revised, and allow at least sixty additional days for public comment. This would require agencies to open to full public scrutiny changes in the provisions of the rule, or in the information on which the agency relies in the promulgation of the rule, which did not result from public comment. At the same time, it would not require agencies to needlessly repeat the rule making procedure to incorporate changes which resulted from public comment. Furthermore, it would not allow agencies to determine for themselves which changes are significant.

11. As stated above, proposed Section 553(d)(3) would require agencies to allow oral presentations during rule making proceedings for major rules. It would also require an opportunity for cross-examination "only (i) when requested by interested persons for the resolution of material issues of fact and (ii) when other available procedures for the resolution of material issues...are determined to be inadequate." Apparently, the drafters of the bill felt that this required opportunity for cross-examination amounted to overkill, because they included the following language: "No court shall hold unlawful or set aside an agency rule because of...(ii) failure by an agency to afford an opportunity for cross-examination pursuant to subsection (d)(2) of this section, unless the court finds upon review of a final rule, that such failure renders the rule unlawful under Section 706(a) (2)(A), (B), or(C) of this title." (proposed Section 553(f)(3)). (We are assuming that subsection (d)(3) was what the drafters intended because (d)(2) does not address the issue of cross-examination). In sum, the bill appears to us to contain several compromises between those favoring extensive, adversary rule making procedures and those favoring a quicker, less cumbersome procedure. In our view, the latter of these alternatives is preferable. We feel that it is unlikely that mechanisms such as cross-examination would add significantly to the value of the rule making proceedings, while it is very likely that they would add significantly to the cost of making rules (and defending rules attacked under 5 U.S.C. Section 706). Therefore, it is our opinion that even in the case of rules having monumental effects, an opportunity for oral presentation without cross-examination is sufficient.

12. Proposed Section 553(e)(3)(A) would set forth a requirement that all rules, "except for rules which grant or recognize an exemption or relieve a restriction," be published thirty days prior to their effective date. While we can see a need for this exception, we feel that in accordance with the important administrative law goal of public notice, even rules excepted by this provision should not be allowed to become effective until published in the Federal Register.

13. Final rules, according to the provisions of the Laxalt bill, would have to be published with a statement of their basis and purpose, which would include "a memorandum of law supporting the determination of the agency that the final rule is clearly within the authority delegated by law and consistent with congressional intent" (proposed Section 553(e)(3)(A)(iii)). While we feel it probable that the phrase "delegated by law" is intended to be synonymous with "delegated by statute," it is our experience that agencies will sometimes cite another source for rule making authority (for example, executive order, constitution or common law). Therefore, we suggest that the phrase "delegated by law" be clarified.

14. Proposed Section 553(e)(5)(B) allows agencies to rely on material not identified in the notice of proposed rulemaking if the material was "identified by the agency in the Federal Register or at a public rule making proceeding, was placed in the rule making file, and interested persons were given adequate notice to comment upon such material prior to the agency relying on it." Earlier provisions of the bill required a "description" rather than an identification of materials to be relied on; in that context, we suggested that a list of such materials, along with information facilitating public access to them, would suffice. Therefore, we would suggest a clarification of the term "identified" so that it would mean "listed" instead of "described."

15. Proposed Section 553(f)(1) provides that the promulgating agency must maintain a public rulemaking file, which file shall, when supplemented with material excluded from it under paragraph (2) of 553(f), constitute the rule making record for the purpose of judicial review. Paragraph (2) allows the exclusion of materials currently kept from public scrutiny by 5 U.S.C. Section 552(b). We feel that there might be a possibility that persons seeking such information might attack a rule (using 5 U.S.C. Section 706) merely to evade the provisions of Section 552(b), but our feeling is admittedly somewhat speculative.

16. Section 4 of the Laxalt bill would create new Section 560 in Title 5, U.S.C. This Section would require agencies to maintain an ongoing review of each of their major rules, each such rule to be reviewed once every ten years. As a part of this review, each agency would have to decide whether to amend, repeal, or renew its major rules.

In general, we feel that a periodic, on-going review of rules is an important means of ensuring that agency rules continue to fulfill the legislative intent behind the statutes which authorize them and that they continue to serve the best interests of the public. However, in our view the mechanisms the Laxalt bill employs to effect this review are not the most effective.

The problems we see with proposed Section 560 concern the schedules for review which agencies would be required to publish and the lack of any sanctions for non-compliance with proposed Section 560. The apparent reasons for setting out a ten-year review period are to open agency rules to a systematic and methodical agency reconsideration with public input, and to keep agencies from being burdened with a requirement for review at intervals too close together. The way the bill is written, however, there is nothing to prevent agencies from scheduling the review of all their rules for the tenth year and pushing the renewals and amendments through en masse at that time, making it more difficult for the affected public to comment on each individual rule. Also, in the bill's present form there is no mechanism for enforcing compliance with the agency's own schedule of review, or, for that matter, for enforcing compliance with any of the provisions of proposed Section 560.

In light of our experience, we feel that legislative oversight of the review of agency rules would be a more effective means of ensuring a meaningful review, and of keeping agencies on schedule. The legislative branch is in a unique position for this purpose; it does not have to wait for a lawsuit and treat matters on a case by case basis, as do the courts, and it would not be placed in the questionable position of having to critique and police itself, as would the executive branch. Furthermore, it only makes sense that the same body which delegated the authority for agency rules oversee the review of those rules to determine if they still further the legislative intent and public policy involved in the delegation.

17. Section 5 of the Laxalt bill would, as we read it, make two substantial changes in 5 U.S.C. Section 706. The first of these would be the addition of a new ground for judicial invalidation of agency action. Proposed Section 706 would allow courts to invalidate agency actions, findings and conclusions found to be

> without substantial support in the rulemaking file, viewed as a whole, for the asserted necessary factual basis, as distinguished from the policy or legal basis, of a rule adopted in a proceeding subject to Section 553 of this title. (Proposed Section 706(a)(2)(F))

It is unclear to us whether the phrase "without substantial support in the rulemaking file" has a meaning similar to the phrase "unsupported by substantial evidence in a case subject to sections 556 and 557 of this title...," which is found in current Section 706(2)(E). The latter phrase has been construed in numerous cases, and has developed a relatively well established meaning over the years. We would suggest that the bill make clear whether the newly created standard means the same thing as the current standard for review.

18. The second substantial change the Laxalt bill seeks to make in current Section 706 is the addition of the following language:

> In making determinations under clause (2)(C) of subsection (a) of this section, the court shall hold unlawful and set aside action by the agency that is shown not to be within the scope of agency jurisdiction or authority on the basis of the language of the statute or, in the event of ambuiguity, other evidence of legislative intent. In making determinations on other questions of law, the court shall not accord any presumption in favor of or against agency action. (Proposed Section 706(c))

We interpret this language to strip from all agency action the presumption of validity traditionally accorded by the courts, except in cases in which agency action

* Harter's point

is attacked as being outside an agency's statutory authority. We are certainly in favor of subjecting agency rules to stricter judicial scrutiny, but we do not feel that the exception for statutory authority challenges is warranted. Especially in a system such as that proposed by this bill, which does not provide a mechanism for congressional oversight of rulemaking, it is essential that the courts be given an unfettered hand to keep agencies within the statutory limits of their power.

If it is felt that the presumption of validity should be preserved for agency action attacked as being unauthorized by statute, there might still be ways in which the presumption could be suspended in appropriate situations. In Iowa, a legislative objection to an agency rule reverses the presumption of validity and shifts the burden of persuasion to the party or parties defending the rule from a legal attack on its validity. Perhaps a system such as this could be developed at the federal level.

In sum, we feel that proposed Section 706(c) is an important and necessary change in present law, but that it does not go far enough. Whether through some form of legislative oversight or a blanket elimination of the presumption of validity, we feel that rules should be subject to strict scrutiny to determine if they are within statutory authority.

19. Section 6 of the Laxalt bill, which would amend 28 U.S.C. Section 2112, would appear to be helpful in eliminating duplicative litigation.

20. Section 7 of the Laxalt bill would add Section 561 to Title 5 of the United States Code. Agencies would be required by this section to publish at six-month intervals an agenda of all rulemaking action planned for the following twelve months. The agenda would be required to contain a number of useful facts concerning the rules affected, which we see as facilitating informed public comment and thus as an improvement in present law. We are troubled, however, with subsection (c) of proposed Section 561, which allows agencies to promulgate rules not listed on the agenda if certain conditions are met. In our opinion, this provision robs the section of much of its effectiveness and usefulness. While there are certainly emergency situations in which agencies would be justified in avoiding the agenda requirements, we feel that absent a bona fide emergency, agencies should be required to comply

with the provisions of this subsection as a condition of undertaking rulemaking procedures. We know of no other way this section can be truly effective.

Technical

The remainder of these comments address possible technical difficulties with the bill. Because we are working from a preliminary draft of the bill, and not the one which was introduced in the Senate, the defects cited may already have been corrected.

1. Section 3 of the bill states at the beginning that it amends 5 U.S.C. Section 553 by redesignating subsection (e) as (g), and by amending subsections (a) through (d). Although it adds new subsections (e) and (f), there is no enacting language for these additions. We suggest that the first sentence of Section 3 of the bill be changed accordingly.

2. Proposed Section 553(d)(1) requires agencies to give interested persons at least sixty days to "participate in the rulemaking...." Proposed Section 553(d)(2)(B) refers to this sixty-day period for "participation in the rulemaking." We suggest that the phrases "participate in" and "participation in" be changed to "comment on," to more accurately reflect the true nature of the rulemaking process and to avoid confusion.

3. The word "written" is misspelled in proposed Section 553(d)(3)(ii).

4. The last line of proposed Section 553 (e)(4) contains the phrase "expended by for such promulgation," a phrase which appears to contain either one word too many or several words too few.

5. Proposed Section 553(f)(1) provides that the rulemaking file, and the material excluded from it in accordance with proposed subsection (2), "shall constitute the rulemaking record for purposes of judicial review." Proposed Section 706(a) would allow courts to invalidate agency action found to be "without substantial support in the rulemaking file," but makes no mention of material excluded from the file. We suggest that these two provisions be harmonized.

6. Proposed Section 553(f)(3)(ii) should probably cite "subsection (d)(3) of this section" instead of (d)(2).

7. In Section 4 of the Laxalt bill, proposed Section 560(f)(1) contains misspellings of the words "total" and "extension"; in (f)(2), "concurrence" is misspelled. Also, the close quote marks have been omitted at the end of proposed subsection (g).

8. Section 7(b) of the bill is preceded by unnecessary quotation marks.

BUMPERS BILL (S.67)

Substantive

1. Present Sec. 553(a)(1) exempts matters relating to agency management or personnel, loans, grants, or benefits. S-67 retains this exemption except to the extent that notice and hearing are required by statute. As does present law, proposed subsection (a)(1) also exempts rules of agency organization when notice and hearing are not required by statute (though they would be exempt from operation of the entire section under S-67 rather than from subsection (b) as under present law). The proposed subsection (a)(1)(B) does not represent a substantial change from existing law. Such a change is in order. The present provision is used to avoid the rulemaking process in matters relating to loans and grant programs. Preferable is the parallel language of the Laxalt bill which would amend Section 553 to provide, "This section does not apply, except when notice or hearing is otherwise required by statute, to any. . . rule relating exclusively to internal personnel rules and personnel practices of an agency." This language clearly indicates the intent to provide an exemption for internal personnel matters only.

2. Proposed Sec. 553 (a)(1)(C) also retains the present exemption of matters relating to public property and contracts. The proposed language does add to the requirement that the agency "comply with any rule or directive relating to such matters issued by the Office of Federal Procurement Policy, the General Services Administration, or any other agency pursuant to statute." This qualification is an improvement. We suggest, however, that the Laxalt approach be adopted and clause (C) be eliminated. The exemption in favor of public property and contracts could leave too wide a gap in the coverage of the rulemaking requirements.

3. Clause (D) of the proposed Sec. 553(a)(1) would preserve the exception contained in present Sec. 553(b) which provides that Sec. 553 does not apply when notice and

hearing are not required by statute and the agency for good cause finds that notice and public procedure on the rule are impracticable, unnecessary, or contrary to the public interest. We feel that this provision would allow too much rulemaking to be done without notice and public comment, violating the spirit and purpose of the APA. It is our opinion that this exception should be eliminated.

If it is decided that this exception should be kept, we would suggest that the phrase "for good cause" be deleted from the clause; it adds little to the meaning of that provision, and has the potential for generating much confusion and litigation. If the exception is eliminated, an additional provision allowing for emergency rulemaking should be adopted. Such a provision is found in the Laxalt bill. An emergency rulemaking provision would allow the agency to temporarily avoid the rulemaking process in matters of sudden urgency. The Laxalt provision on emergency rulemaking is a step in the right direction but is deficient in a few respects. In addition to requiring publication of the emergency rule, such a provision should clearly state requirements regarding the effective date and its publication.

Elimination of the exception for rules on matters for which the agency finds notice and public procedure are impracticable, unnecessary, or contrary to the public interest would also require elimination of paragraph (a)(2) which requires the agency to publish such a finding and the reasons therefor.

4. Section 553(b) presently provides that, except where notice or hearing is required by statute, subsection (b) does not apply to interpretive rules or general statements of policy. The bill provides in proposed Sec. 553(a)(1)(E) that when such rules and statements have general applicability and would have a substantial impact on persons outside the agency, the agency must, after issuance of the rule or statement, follow the normal rulemaking procedures upon petition of any affected person. Inasmuch as the Bumpers proposal clarifies the law and limits what agencies may do without notice and hearing, it is at least a step in the right direction. However, in our opinion it still allows too much agency action without public notice and public input; clause (E) should be eliminated altogether.

One problem with the Bumpers proposal is its use of the term "issuance." Upon petition of any affected person the agency must, after issuance of the rule or statement, follow the normal rulemaking procedure. Nothing in clause (E) indicates how the rule or statement is issued or how affected persons are expected to become aware of the rule'or statment. A notice of adoption and the full text of the rule should be published in the Federal Register on or before the effective date of the rule. The provision should also incorporate a time limit measured from the date of publication within which time affected persons must petition the agency for rulemaking.

The proposed clause (E) also leaves unclear the effect of the filing of a petition by an affected person on the legal effectiveness of the rule. We assume that upon the filing of the petition the rule must be withdrawn and is no longer enforceable and that the agency must comply with the notice and hearing requirements before the rule can be applied. Clause (E) should be clarified in this regard.

Another problem in this area concerns the adoption of conflicting policy statements and interpretations by different regions of the same agency. In our view, this problem might be ameliorated by a requirement that all general policy statements and interpretative rules be subject to general notice and hearing provisions and thus, that they be promulgated through the central agency office.

Again, we prefer that no exception from the rulemaking requirements of Sec. 553 be granted for interpretive rules or general statements of policy. However, if some exception must be included and the concerns expressed above are met, the Bumpers proposal would be an adequate compromise position and is preferable to the Laxalt version.

5. S-67 would maintain the present notice requirement of Sec. 553(B) by providing that "the notice shall include - (1) the terms or substance of the proposed rule or a description of the subjects and issues involved...." In light of our experience in Illinois, we suggest that proposed subsection (c)(1) contain requirements that rules which amend already existing rules indicate proposed changes in existing language and that repealers contain the full text of the repealed rule.

6. Proposed subsection (b) would also add to the information required to be published in a notice of proposed rulemaking. Clause (5) would require the notice to include "a description of any methodology used in obtaining and analyzing the data," and clause (6) would include "an identification of the reports, documents, studies or other

information from which the factual data were derived." The detailed description of methodology is not an essential element of the notice of proposed rulemaking. We would much prefer to have the notice include the full text of the proposed rule if it came to a choice between them. The notice could inform interested persons where information regarding the methodology could be obtained. The language of clause (6) is preferable to the parallel provision in the Laxalt bill as it seems to require a list of documents, studies, and reports rather than a description of all information to be relied on. We suggest that clause (6) would be improved if it required the notice to state where copies of the information may be obtained.

7. As does present Sec. 553, the last sentence of Bumpers' proposed Sec. 553(b) provides that subsection (b) shall not apply to rules of agency practice or procedure. There is no reason this exception from the rulemaking requirements couldn't be incorporated into subsection (a) dealing with applicability. The Laxalt bill contains all such exceptions in a single subsection and is preferable in that regard.

8. Proposed subsection (c) of Sec. 553 provides in paragraph (1) that the agency must provide interested persons an opportunity to submit written and oral comments and data. It is not clear from the rule how great an opportunity interested persons would have. Some minimal period of time within which interested persons may be required to submit comments and information should be prescribed. The Laxalt bill, for example, provides in proposed Sec. 553(d)(1) that the agency shall allow interested persons not less than sixty days to submit comments and information. The Laxalt provision is preferable in this regard.

9. Proposed paragraph (c)(1) requires an agency to "provide interested persons an opportunity for oral presentation of data, views, and arguments." The provision appears to require a public hearing for each rulemaking initiated by the agency - a potentially wasteful requirement. The Illinois Joint Committee has introduced Senate Bill 514 in the current session of the General Assembly. Passage of that bill as amended by Senate amendment No. 1 would require agencies to hold public hearings on proposed rules when requested to do so by 25 pesons, by an association representing at least 100 persons, by the governor, by a unit of local government, or by the Joint Committee itself. This type of provision balances complete agency discretion regarding oral comments and mandated public hearings in every case. The interested public would decide when a hearing is necessary, and hearings would be reserved for situations in which they would be more productive.

10. Proposed paragraph (c)(1) would require the record of a rulemaking proceeding to "be kept open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary comments." This provision is a good compromise between Sec. 553 which allows opportunity solely for submission of materials and Sec. 556(d) which allows a party "to conduct such cross-examination as may be required for full and true disclosure of the facts." It is hard to tell when cross-examination is required for full and true disclosure until after the examination. The agency probably would be forced to allow more time consuming cross-examination than is really necessary just to protect itself. If, after submission of information and rebuttal, the agency cannot reconcile conflicting information, cross-examination could be still used under proposed paragraph (c)(2) in order to better determine the reliability and validity of information presented.

11. Proposed paragraph (c)(2) would allow agencies to use such additional rulemaking procedures as it determines are appropriate based on certain factors. This is a reasonable provision.

12. Proposed Sec. 553(d)(2) would provide:

> (2) If an agency expects, in its statement of basis and purpose for a final rule, to rely on written data or factual matter which is developed during the course of the rulemaking, which was not previously available for public comment, and which is likely to affect the outcome of the rulemaking, the agency shall permit the public a reasonable opportunity to comment thereon.

We believe that the key distinction in changes in the information relied on or in changes of text in reliance on new information is whether or not the information is developed through the public comment process. If, in its notice of adopted rule, the agency relies on information which is developed or obtained outside the public comment process and which was not listed in the notice of proposed rulemaking, the agency should be required to publish a notice listing the new information and where it could be obtained. The notice should also inform the public that there will be an additional period in which to submit information and comment in response to the new information. Similarly, changes made from the proposed terms and substance of a rule or proposed text of a rule should also require additional notice and comment when the changes are not made in response to information, views, and arguments gathered in response to the notice of proposed rulemaking. Simply put, when the final notice reflects changes in the text of the rule or the information relied on and the changes are not made in response to public comment, the agency should be required to publish notice of the changes, of the method of obtaining additional information, and of an additional comment period. Paragraph (2) is not broad enough in that it does not require additional notice and comment for changes in text made other than in response to public comment.

On the other hand, paragraph (2) seems overly broad in that it could be interpreted to require notice and an additional comment period in some circumstances when information likely to affect the outcome of the rulemaking is developed during the rulemaking. Our position is that no further opportunity for comment is necessary when the agency relies on information developed by the public through the rulemaking process. An agency should be accorded some leeway to consider and rely on information submitted by the public without further prolongation of the proceedings.

13. Proposed paragraph (d)(3) would require publication of a rule at least thirty days before its effective date except in the cases of

(1) a rule which grants or recognizes an exemption or relieves a restriction;
(2) interpretive rules and statements of policy;
(3) as otherwise provided by the agency for good cause found and published with the rule; or
(4) where a longer period of time is required by law.

We recommend that clauses (2), (3), and (4) be eliminated. Interpretive rules and statements of policy should be subject to the same rulemaking requirements as other rules. The need for a good cause exception from the prior publication requirement could be fulfilled in cases of sudden urgency by an emergency rulemaking provision such as that discussed earlier. Clause (4) is probably not necessary. The suggested approach is the one taken in Laxalt's proposed Sec. 553(e)(3)(A). Even rules which grant or recognize an exemption or relieve a restriction should not be allowed to be effective until the public has had notice by publication in the Federal Register.

14. Bumpers' proposed Sec. 553(e)(1) would require an agency to establish a public file in each rulemaking proceeding and prescribes the contents of such a file. The Bumpers version would include in the file substantially the same information as a similar provision in the Laxalt bill with the exception of the transcript of oral proceedings. Since the agency would be required to keep a transcript of any oral presentations under proposed section (c)(1), it could be argued that the transcript would need to be included in the file by virtue of clause (F) which applies to "any statement, description, or analysis required to be prepared by the agency in formulating the rule." However, it would be simpler to list the transcript as one of the items required just as the Laxalt bill does.

15. Present subsection (e) of Sec. 553 will be relettered but not changed by the Bumpers bill. It provides that agencies shall give interested persons the right to petition for action on a rule. We wholeheartedly support the right of persons to petition regarding rules; a similar provision is found in Illinois law. Section 8 of the Illinois Administrative Procedure Act goes a little further. We suggest that the adoption of similar federal language be considered.

16. Bumpers' proposed Sec. 555 allows agencies to use expedited hearing proceedings in certain cases. Paragraph (a)(1) provides that "an agency may, in its discretion, apply this section to any agency proceeding subject to section 554 of this title...including...rulemaking...." We are not sure how an agency would be able to apply the procedures of Sec. 555 to a rulemaking since rulemakings would not appear to be proceedings subject to Sec. 554. With certain exceptions, Section 554 applies, according to its own terms, "in every case of adjudication required by statute to be determined on the record after opportunity for agency hearing." According to Section 551(7), an "adjudication" is the agency process for formulation of an order. "Order" is defined in Section 551(6) as a final disposition in a matter other than rulemaking. Thus, agencies would be able to apply Section 555 to agency procedures for formulation of final dispositions in matters other than rulemaking including rulemaking. We believe clarification is in order.

We realize that after NLRB v. Wyman - Gordon Co., 394 U.S. 759 (1969), there may be some dispute as to whether an agency may adopt a rule of propsective application in an adjudication. While technically it appears agencies may not do so, it may be that a reference to rulemaking was included in Section 555 just to cover the possibility of rulemaking in adjudications. We believe it would be preferable for Congress to require compliance with the rulemaking requirements of Section 553 when an agency promulgates a rule of prospective effect in an adjudication.

17. Proposed Section 706 would allow courts to invalidate agency actions, findings and conclusions found to be

> without substantial support in the rulemaking file, viewed as a whole, for the asserted or necessary factual basis of a rule adopted in a proceeding subject to Section 553 of this title. (Proposed Section 706(a)(2)(F))

It is unclear to us whether the phrase "without substantial support in the rulemaking file" has a meaning similar to the phrase "unsupported by substantial evidence in a case subject to section 556 and 557 of this title...," which is found in current Section 706(2)(E). The latter phrase has been construed in numerous cases, and has developed a relatively well established meaning over the years. We would suggest that the bill make clear whether the newly created standard means the same thing as the current standard for review which is quoted above.

Technical

1. Proposed Sec. 553(a)(1) contains the phrase "notice and hearing is not required." We suggest substitution of the verb "are" for "is".

2. The same problem occurs in Sec. 553(a)(1)(D) which contains the phrase "notice and public procedure is impracticable,...."

3. Section 553(e)(1) refers to "paragraph (2) of this subsection." No paragraph (2) appears in our copy of section 553(e).

S.344

Substantive

1. Section 3(a) requires each agency to prepare an agenda of significant rules it intends to propose in the following twelve months, but provides that failure to list an area of possible rulemaking will not preclude an agency from proposing or issuing any rule. While we feel the agenda requirement is a valuable step toward increasing agency responsibility in rule making, it appears that this provision is robbed of its usefulness by the lack of any sanction for failure to comply. Certainly, special and unforseeable circumstances sometimes arise which necessitate immediate agency action; rules brought about by these situations may be excepted from the provisions of Section 3(a) as "emergency rules." This could be accomplished by a provision similar to proposed 5 U.S.C. Section 553(b) of Senator Laxalt's bill.

2. Section 3(b) requires agencies to transmit copies of proposed or final significant rules to the appropriate Congressional committees the same day the rules are forwarded to the Federal Register. Section 4(a) provides that "no significant rule may become effective until the expiration of twenty days after the date on which the rule is received by the appropriate committees." It is unclear whether the committees are to receive two twenty-day periods to consider rules (one for proposed and one for final rules). We suggest that these provisions be clarified, preferably by inserting the word "final" between "the" and "rule" in the above quoted language (line 13 of page 3 of the bill).

3. Sections 4(a)(1) and 4(a)(3) each contain the phrase "that during such time a joint resolution disapproving such rule has not been enacted into law." We find this language troublesome; it is not entirely clear to us what the phrase "enacted into law" means. If it means that the joint resolution must have been passed by both houses and either approved by the President or passed over his veto, we question whether enough time is given for this action. We would opt for a construction of the phrase "enacted into law" to mean "passed by both houses of Congress," and in any event would suggest that the phrase be clarified.

4. We believe that there are several other ways in which Section 4 should be clarified and simplified. First, there are twenty-day, thirty-day and sixty-day periods to be reckoned with in subsection (a), along with the provisions of subsection (c), which set

out how these time periods are to be calculated. Unless it is felt that each of these provisions concerning times for action is essential, we would suggest a uniform time period for Congressional consideration of rules - one which would balance the interest of the agencies in adopting rules without undue delay and the need by Congress to have sufficient time for meaningful and deliberate action.

A second possible problem with Section 4 is that it is unclear what portion of a rule a joint resolution of disapproval would prevent from becoming effective. Agencies often promulgate hundreds of pages of rules at once; if a joint resolution of disapproval directed at one small segment of one of these could prevent a large block of rules from becoming effective, we feel that this would be an inefficient and unnecessary result. In this light please consider Section 7.06a of the Illinois Administrative Procedure Act, which permits a legislative veto of "a proposed rule, amendment or repealer or portion of a proposed rule, amendment or repealer."

A third possible problem with Section 4 is that it leaves a number of questions unanswered. For example: (1) Is an agency determination of the significance or insignificance of a rule conclusive on Congress? (2) If an agency does not transmit a rule to the appropriate committee, may Congress still consider it? (3) Can Congress enact a joint resolution of disapproval outside the time frames provided, as long as the rule is not yet by its terms effective?

5. It is difficult to comment on Section 5 of the bill, which concerns waiver of Sections 3 and 4 in certain cases, because the bill is completely silent as to who makes this waiver, and by what procedure. If the decision as to whether to waive is forced upon the chairman or the chairman and ranking minority member of each appropriate committee, we feel that this is too heavy a burden.

As stated earlier, we are aware that there are emergency situations in which usual rule making (and in this case, rule reviewing) procedures would be contrary to the public interest. It is our opinion, however, that exemptions created for such situations should not be broad enough to allow non-emergency rules to be adopted without the ordinarily required safeguards. We feel that if Section 5 is to contain an exception, this exception should be limited to emergency rules as defined in Senator Laxalt's bill.

6. The second sentence of Section 6 reads as follows:

> The compliance of any agency with the provisions of this Act, including any determination by an agency under this Act, shall not be subject to judicial review of any kind.

This provision would appear to eviscerate the entire "Agency Accountability Act of 1981," although reviewing courts might either find it unconstitutional or be able to construe their way around it when it is found appropriate to do so.

7. Section 7(b) defines the term "appropriate committee," as the committee in either chamber "which has primary jurisdiction over the statute pursuant to which the agency may issue a particular rule." This definition may not be sufficient; in our experience, agencies may sometimes promulgate rules under authority conferred by sources other than statute, such as executive order or constitutional law. A procedure would have to be developed for determining which committee is the appropriate one in such circumstances.

8. Section 7(c) defines "rule" and excepts ratemaking from this definition. This exception would not appear to be necessary if any of several pending bills excepting ratemaking from procedures required by 5 U.S.C. Section 533 are passed.

9. "Significant rule" is defined in Section 7(d), as a rule an agency determines to be significant. Agencies are required to consider a number of things in making that determination, but are given no standards through which they can ultimately make the judgment. We are not in favor of giving agencies unfettered discretion to determine what rules are "significant"; there is plenty of room for honest disagreement in many cases, and in others a provision such as this might purposely be used to shield a rule from Congressional scrutiny for one reason or another.

Technical

1. It is our opinion that S.344, if enacted, should be codified as part of the Administrative Procedure Act in Title 5 of the United States Code, and that its provisions and definitions should be harmonized with that statute.

2. In Section 2(a)(4), the word "conflicting" is misspelled.

3. Section 3(b) provides that agencies must "transmit" a copy of each significant rule to the appropriate committees on the same day they "forward" the rule to the Federal Register for publication. We suggest that the method of "transmittal" be more clearly spelled out to eliminate possible agency evasion of this provision, whether negligently or intentionally.

4. In Section 5(2), the word "chairman" should probably be changed to "chairmen".

5. Section 9 provides that the bill, if enacted, would become effective at the beginning of the first session of the Ninety-seventh Congress. Should this read "Ninety-eighth"?

THE ILLINOIS ADMINISTRATIVE PROCEDURE ACT

(ILLINOIS REVISED STATUTES, CHAPTER 127, PARAGRAPHS 1001-1021)

Section 1. SHORT TITLE) This Act shall be known and may be cited as "The Illinois Administrative Procedure Act." **(PA 79-1083, effective September 22, 1975)**

Section 2. APPLICABILITY) This Act applies to every agency as defined herein. Beginning January 1, 1978 in case of conflict between the provisions of this Act and the Act creating or conferring power on an agency, this Act shall control. However if an agency has existing procedures on July 1, 1977 specifically for contested cases or licensing those existing provisions control, except that this exception respecting contested cases and licensing does not apply if the Act creating or conferring power on the agency adopts by express reference the provision of this Act. Where the Act creating or conferring power on an agency establishes administrative procedures not covered by this Act, such procedures shall remain in effect.

The provisions of this Act shall not apply to (1) preliminary hearings, investigations or practices where no final determinations affecting State funding are made by the State Board of Education, (2) State Board of Education statements, guidelines or policies which do not have the force of law, (3) legal opinions issued under Section 2-3.7 of The School Code, and (4) as to State colleges and universities, their disciplinary and grievance proceedings, academic irregularity and capricious grading proceedings, and admission standards and procedures and (5) the class specifications for positions and individual position descriptions prepared and maintained pursuant to the "Personnel Code"; however such specifications shall be made reasonably available to the public for inspection and copying. Neither shall the provisions of this Act apply to hearings under Section 20 of the "Uniform Disposition of Unclaimed Property Act." **(PA 79-1083; Amended by PA 80-1035, effective September 27, 1977; Amended by PA 80-1457, effective January 1, 1979; Amended by PA 81-1514, effective January 1, 1981)**

Section 3. DEFINITIONS) As used in this Act, unless the context otherwise requires, the terms specified in Section 3.01 through 3.09 have the meanings ascribed to them in those Sections. **(PA 79-1083)**

Section 3.01. AGENCY) "Agency" means each officer, board, commission and agency created by the Constitution, whether in the executive, legislative, or judicial branch of State government, but other than the circuit court; each officer, department, board, commission, agency, institution, authority, university, body politic and corporate of the State; and each administrative unit or corporate outgrowth of the State government which is created by or pursuant to statute, other than units of local government and their officers, school districts and boards of election commissioners; each administrative unit or corporate outgrowth of the above and as may be created by executive order of the Governor. However, "agency" does not include:

(a) the House of Representatives and Senate, and their respective standing and service committees;

(b) the Governor; and

(c) the justices and judges of the Supreme and Appellate Courts.

No entity shall be considered an "agency" for the purposes of this Act unless authorized by law to make rules or to determine contested cases. **(PA 79-1083; Amended by PA 80-1457, effective January 1, 1979)**

Section 3.02. CONTESTED CASE) "Contested case" means an adjudicatory proceeding, not including rate-making, rule-making, quasi-legislative, informational or similar proceedings, in which the individual legal rights, duties or privileges of a party are required by law to be determined by an agency only after an opportunity for hearing. **(PA 79-1083; Amended by PA 80-1035, effective September 27, 1977)**

Section 3.03. HEARING EXAMINER) "Hearing examiner" means the presiding officer or officers at the initial hearing before each agency and each continuation thereof. **(PA 79-1083)**

Section 3.04. LICENSE) "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law, but it does not include a license required solely for revenue purposes. **(PA 79-1083)**

Section 3.05. LICENSING) "Licensing" includes the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal or amendment of a license. **(PA 79-1083)**

Section 3.06. PARTY) "Party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party. **(PA 79-1083)**

Section 3.07. PERSON) "Person" means any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency. **(PA 79-1083)**

Section 3.08. RATE-MAKING OR RATE-MAKING ACTIVITIES) "Rate-making" or "rate-making activities" means the etablishment or review of or other exercise of control over the rates or charges for the products or services of any person, firm or corporation operating or transacting any business in this State. **(PA 79-1083)**

Section 3.09. RULE) "Rule" means each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy, but does not include (a) statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency, (b) informal advisory rulings issued pursuant to Section 9, (c) intra-agency memoranda or (d) the prescription of standarized forms. **(PA 79-1083; Amended by PA 80-1035, effective September 27, 1977)**

Section 4. ADOPTION OF RULES: PUBLIC INFORMATION, AVAILABILITY OF RULES) (a) In addition to other rule-making requirements imposed by law, each agency shall:

1. adopt rules of practice setting forth the nature and requirements of all formal hearings;
2. make available for public inspection all rules adopted by the agency in the discharge of its functions.

(b) Each agency shall make available for public inspection all final orders, decisions and opinions, except those deemed confidential by state or federal statute and any trade secrets.

(c) No agency rule is valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection and filed with the Secretary of State as required by this Act. This provision is not applicable in favor of any person or party who has actual knowledge thereof.

(d) Rule-making which creates or expands a State mandate on units of local government, school districts, or community college districts is subject to the State Mandates Act. The required Statement of Statewide Policy Objectives shall be published in the Illinois Register at the same time that the first notice under Section 5.01 is published or when the rule is published under Section 5.02 or 5.03. **(PA 79-1083; Amended by PA 80-1035, effective September 27, 1977; Amended by PA 81-1562, effective January 16, 1981)**

Section 4.01. REQUIRED RULES) (a) Each agency shall maintain as rules the following:

1. a current description of the agency's organization with necessary charts depicting same;
2. the current procedures on how the public can obtain information or make submissions or requests on subjects, programs, and activities of the agency;
3. tables of contents, indices, reference tables, and other materials to aid users in finding and using the agency's collection of rules currently in force; and
4. a current description of the agency's rule-making procedures with necessary flow charts depicting same.

(b) The rules required to be filed by this Section may be adopted, amended, or repealed and filed as provided in this Section in lieu of any other provisions or requirements of this Act.

The rules required by this Section may be adopted, amended, or repealed by filing a certified copy with the Secretary of State as provided by paragraphs (a) and (b) of Section 6, and may become effective immediately. **(Added by PA 80-1035, effective September 27, 1977; Amended by PA 81-1044, effective October 1, 1979)**

Section 4.02. STANDARDS FOR DISCRETION) Each rule which implements a discretionary power to be exercised by an agency shall include the standards by which the agency shall exercise the power. Such standards shall be stated as precisely and clearly as practicable under the conditions, to inform fully those persons affected. **(Added by PA 80-1129, Effective July 1, 1980)**

Section 5. PROCEDURE FOR RULE-MAKING) (a) Prior to the adoption, amendment or repeal of any rule, each agency shall accomplish the actions required by Sections 5.01, 5.02 or 5.03, whichever is applicable.

(b) No action by any agency to adopt, amend or repeal a rule after this Act has become applicable to the agency shall be valid unless taken in compliance with this Section. A proceeding to contest any rule on the ground of non-compliance with the procedural requirements of this Section must be commenced within 2 years from the effective date of the rule.

(c) The notice and publication requirements of this Section do not apply to a matter relating solely to agency management, personnel practices, or to public property, loans or contracts. **(PA 79-1083; Amended by PA 80-1035, effective September 27, 1977; Amended by PA 81-1044, effective October 1, 1979)**

Section 5.01. GENERAL RULEMAKING) In all rulemaking to which Section 5.02 or 5.03 does not apply, each agency shall:

(a) give at least 45 days' notice of its intended action to the general public. This first notice period shall commence on the first day the notice appears in the Illinois Register. The first notice shall include a text of the proposed rule, or the old and new materials of a proposed amendment, or the text of the provision to be repealed; the specific statutory citation upon which the proposed rule, the proposed amendment to a rule or the proposed repeal of a rule is based and is authorized; a complete description of the subjects and issues involved; and the time, place and manner in which interested persons may present their views and comments concerning the intended action.

During the first notice period, the agency shall provide all interested persons who submit a request to comment within the first 14 days of the notice period reasonable opportunity to submit data, views, arguments or comments, which may, in the discretion of the agency, be submitted either orally or in writing or both. The notice published in the Illinois Register shall indicate the manner selected by the agency for such submissions. The agency shall consider all submissions received.

(b) provide up to 45 days additional notice of its intended action to the Joint Committee on Administrative Rules. The second notice period shall commence on the day written notice is received by the Joint Committee, and shall expire 45 days thereafter unless prior to that time the agency shall have received a statement of objection from the Joint Committee, or notification from the Joint Committee that no objection will be issued. The written notice to the Joint Committee shall include the text and location of any changes made to the proposed rule during the first notice period, and, if written request has been made by the Joint Committee within 30 days after initial notice appears in the Illinois Register pursuant to Paragraph (a) of this Section, shall include an analysis of the economic and budgetary effects of the proposed rule. After commencement of the second notice period, no substantive change may be made to a proposed rule unless it is made in response to an objection or suggestion of the Joint Committee.

(c) after the expiration of 45 days, after notification from the Joint Committee that no objection will be issued, or after response by the agency to a statement of objections issued by the Joint Committee, whichever is applicable, the agency shall file, pursuant to Section 6 of this Act, a certified copy of each rule, modification, or repeal of any rule adopted by it, which shall be published in the Illinois Register. Each rule hereafter adopted under this Section is effective upon filing, unless a later effective date is required by statute or is specified in the rule. **(Added by PA 81-1044, effective October 1, 1979)**

Section 5.02 EMERGENCY RULEMAKING) "Emergency" means the existence of any situation which any agency finds reasonably constitutes a threat to the public interest, safety or welfare. Where any agency finds that an emergency exists which requires adoption of a rule upon fewer days than is required by Section 5.01, and states in writing its reasons for that finding, the agency may adopt an emergency rule without prior notice or hearing, upon filing a notice of emergency rulemaking with the Secretary of State pursuant to Section 6.01 of this Act. Such notice shall include the text of the emergency rule and shall be published in the Illinois Register. Subject to applicable constitutional or statutory provisions, an emergency rule becomes effective immediately upon filing pursuant to Section 6, or at a stated date less than 10 days thereafter. The agency's finding and a statement of the specific reasons therefore shall be filed with the rule. The agency shall take reasonable and appropriate measures to make emergency rules known to the persons who may be affected by them.

An emergency rule may be effective for a period of not longer than 150 days, but the agency's authority to adopt an identical rule under Section 5.01 of this Act is not precluded. No emergency rule may be adopted more than once in any 24 month period. Two or more emergency rules having subtantially.the same purpose and effect shall be deemed to be a single rule for purposes of this Section. **(Added by PA 81-1044, effective October 1, 1979)**

Section 5.03. PEREMPTORY RULEMAKING) "Peremptory rulemaking" means any rulemaking which is required as a result of federal law, federal rules and regulations, or an order of a court, under conditions which preclude compliance with general rulemaking requirements imposed by Section 5.01 and which preclude the exercise of discretion by the agency as to the content of the rule it is required to adopt. Where any agency finds that peremptory rulemaking is necessary and states in writing its reasons for that finding, the agency may adopt peremptory rulemaking upon filing a notice of rulemaking with the Secretary of State pursuant to Section 6.01 of this Act. Such notice shall be published in the Illinois Register. A rule adopted under the peremptory rulemaking provisions of this Section becomes effective immediately upon filing with the Secretary of State and in the agency's principal office, or at a date required or authorized by the relevant federal law, federal rules and reguations, or court order, as stated in the relevant federal law, rules and regulations, and shall be in such form as the Secretary of State may reasonably prescribe by rule. The agency shall file the notice of peremptory rulemaking within 30 days after a change in rules is required. **(Added by PA 81-1044, effective October 1, 1979)**

Section 6. FILING OF RULES) (a) Each agency shall file in the office of the Secretary of State and in the agency's principal office a certified copy of each rule and modification or repeal of any rule adopted by it, including all rules existing on the date this Act becomes applicable to the agency other than rules already so filed. The Secretary of State and the agency shall each keep a permanent register of the rules open to public inspection.

(b) Concurrent with the filing of any material pursuant to this Section, the filing agency shall submit to the Secretary of State for publication in the next available issue of the Illinois Register a notice of rulemaking which presents:

1. if the material is a new rule, the full text of the new rule; or
2. if the material is an amendment to a rule or rules, the full text of the rule or rules as amended; or
3. if the material is a repealer, such notice of repeal shall be published. **(PA 79-1083; Amended by PA 80-1035, effective September 27, 1977; Amended by PA 81-1044, effective October 1, 1979)**

Section 6.01. FORM AND PUBLICATION OF NOTICES) The Secretary of State may prescribe reasonable rules concerning the form of documents to be filed with him, and may refuse to accept for filing such certified copies as are not in compliance with such rules. In addition, the Secretary of State shall publish and maintain the Illinois Register and may prescribe reasonable rules setting forth the manner in which agencies shall submit notices required by this Act for publication in the Illinois Register. The Illinois Register shall be published at least once each week on the same day unless such day is an official State holiday in which case the Illinois Register shall be published on the next following business day and sent to subscribers who subscribe for the publication with the Secretary of State. The Secretary of State may charge a subscription price to subscribers that covers mailing and publication costs.

Notwithstanding any other provision of this Act, if an agency proposes or adopts federal rules or portions thereof, the requirement that the full text thereof be filed shall be satisfied by filing with the applicable notice a photographic or other reproduction of such rules, or a statement that the agency proposes to adopt or is adopting such rules with a citation to the Federal Register or Code of Federal Regulations where the text appears. If an agency proposes or adopts as rules the standards or guidelines, or portions thereof, of any professional, trade or other association or entity, the requirement that the full text thereof be filed shall be satisfied by filing with the applicable notice a photographic or other reproduction of such standards or guidelines. **(Added by PA 81-1044, effective October 1, 1979)**

Section 7. PUBLICATION OF RULES) (a) The Secretary of State shall, by rule, prescribe a uniform system for the codification of rules on or before July 1, 1980. The Secretary of State shall also, by rule, establish a schedule for compliance with the uniform codification system on or before October 1, 1980. Such schedule may be by sections of the codification system and shall require approximately one-fourth of the rules to be converted to the codification system by each October 1, starting in 1981 and ending in 1984. All rules on file with the Secretary of State and in effect on October 1, 1984, shall be in compliance with the uniform system for the codification of rules. The Secretary of State shall not adopt any codification system or schedule under this subsection without the approval of the Joint Committee on Administrative Rules. Approval by the Joint Committee shall be conditioned solely upon establishing that the proposed codification system and schedule are compatible with existing electronic data processing equipment and programs maintained by and for the General Assembly. Nothing in this Section shall prohibit an agency from adopting rules in compliance with the codification system earlier than specified in the schedule.

(b) If no substantive changes are made by the agency in amending existing rules to comply with the codification system, such codified rules may be adopted until October 1, 1984, without requiring notice or publication of the text of the rules pursuant to Section 5. In such a case, the publication requirement shall be satisfied by the publication in the Illinois Register of a notice stating that the agency has adopted the rules to comply with the codification system, that no substantive changes have been made in the rules and that the State Library has reviewed and approved the codification of the rules. The notice shall include the current names and numbers of the rules being codified, an outline of the headings of the sections of the rules as codified and may also include a table indicating the relationship between any rule numbers previously used by the agency and the numbering system of the codified rules. The agency shall provide the text of such rules as codified to the State Library for review and necessary changes and recommenations at least 30 days prior to the publication of such notice. Whenever the codification of an emergency or peremptory rule is changed subsequent to its publication as adopted in the Illinois Register, a notice of such change, in the manner set forth in this subsection, shall be published in the next available issue of the Illinois Register. Such a change in the rule's codification shall not affect its validity or the date upon which it became effective.

(c) Each rule proposed in compliance with the codification system shall be reviewed by the State Library under the Secretary of State prior to the expiration of the public notice period provided by Section 5.01(a) of this Act or prior to the publication of the notice required under subsection (b) of this section. The State Library shall cooperate with agencies in its review to insure that the purposes of the codification system are accomplished. The State Library shall have the authority to make changes in the numbering and location of the rule in the codification scheme, providing such changes do not affect the meaning of the rules. The State Library may recommend changes in the sectioning and headings proposed by the agency and suggest grammatical and technical changes to correct errors. The State Library may add notes concerning the statutory authority, dates proposed and adopted and other similar notes to the text of the rules, if such notes are not supplied by the agency. This review by the State Library shall be for the purpose of insuring the uniformity of and compliance with the codification system. The State Library shall prepare indexes by agency, subject matter, and statutory authority and any other necessary indexes, tables and other aids for locating rules to assist the public in the use of the Code.

(d) The State Library shall make available to the agency and the Joint Committee on Administrative Rules copies of the changes in the numbering and location of the rule in the codification scheme, the recommended changes in the sectioning and headings, and the suggestions made concerning the correction of grammatical and technical errors or other suggested changes. The agency shall in the notice required by Section 5.01(b) of this Act, or if such notice is not required, at least 10 days prior to the publication of the notice required under subsection (b) of this Section, provide to the Joint Committee a response to the recommendations of the State Library including any reasons for not adopting the recommendations.

(e) In the case of reorganization of agencies, transfer of functions between agencies, or abolishment of agencies by executive order or law, which affects rules on file with the Secretary of State, the State Library shall notify the Governor, the Attorney General, and the agencies involved of the effects upon such rules on file. If the Governor or the agencies involved do not respond to the State Library's notice within 45 days by instructing the State Library to delete or transfer the rules, the State Library may delete or place such rules under the appropriate agency for the purpose of insuring the consistency of the codification scheme and shall notify the Governor, the Attorney General and the agencies involved.

(f) The Secretary of State shall publish an Illinois Administrative Code on or before January 1, 1985, and shall update each section of the Code at least annually thereafter. Such Code shall contain the complete text of all rules of all State agencies filed with his office and effective on October 1, 1984, or later and the indexes, tables, and other aids for locating rules prepared by the State Library. The Secretary of State shall design the Illinois Register to supplement such Code. The Secretary of State shall make copies of the Code available generally at a price covering publication and mailing costs.

(g) The publication of a rule in the Code or in the Illinois Register as an adopted rule shall establish a rebuttable presumption that the rule was duly filed and that the text of the rule as published in the Code is the text of the rule as adopted. Publication of the text of a rule in any other location whether by the agency or some other person shall not be taken as establishing such presumption. Judicial notice shall be taken of the text of each rule published in the Code or Register.

(h) The codification system, the indexes, tables, and other aids for locating rules prepared by the State Library, notes and other materials developed under this Section in connection with Administrative Code shall be the property of the State. No person may attempt to copyright or publish for sale such materials except the Secretary of State as provided in this Section. **(PA 79-1083; Amended by PA 80-1035, effective September 27, 1977; Amended by PA 80-1457, effective January 1, 1979; Amended by PA 81-1348, effective July 16, 1980)**

Section 7.01. CERTIFICATION) (a) Beginning January 1, 1978, whenever a rule, or modification or repeal of any rule, is filed with the Secretary of State, the Secretary of State within three working days after such filing shall send a certified copy of such rule, modification or repeal to the Joint Committee on Administrative Rules established in Section 7.02.

(b) Any rule on file with the Secretary of State on January 1, 1978 shall be void 60 days after the date unless within such 60 day period the issuing agency certifies to the Secretary of State that the rule is currently in effect.

Within 45 days after the receipt of any certification pursuant to this sub-section (b), the Secretary of State shall send the Joint Committee on Administrative Rules established in Section 7.02 a copy of each agency's certification so received along with a copy of the rules covered by the certification. **(Added by PA 80-1035, effective September 27, 1977)**

Section 7.02. JOINT COMMITTEE ON ADMINISTRATIVE RULES) (a) The Joint Committee on Administrative Rules is hereby created. The Joint Committee shall be composed of 16 members, 4 members appointed by the President of the Senate and 4 by the Senate Minority Leader, and 4 members appointed by the Speaker of the the House of Representatives and 4 by the House Minority Leader.

Members of the Joint Committee shall be appointed during the month of July of each odd numbered year for 2 year terms beginning August 1, and until their successors are appointed and qualified. In the event of a death of a member or if a member ceases to be a member of the General Assembly a vacancy shall exist. Vacancies shall be filled for the time remaining of the term in the same manner as the original appointments. All appointments shall be in writing and filed with the Secretary of State as a public record.

(b) The Joint Committee shall organize during the month of September each odd numbered year by electing a Chairman and such other officers as it deems necessary. The chairmanship of the Joint Committee shall be for a 2 year term and may not be filled in 2 successive terms by persons of same political party. Members of the Joint Committee shall serve without compensation, but shall be reimbursed for expenses. The Joint Committee shall hold monthly meetings and may meet oftener upon the call of the Chairman or 4 members. A quorum of the Joint Committee consists of a majority of the members.

(c) When feasible the agenda of each meeting of the Joint Committee shall be submitted to the Secretary of State to be published at least 5 days prior to the meeting in the Illinois Register. The provisions of this subsection shall not prohibit the Joint Committee from acting upon an item that was not contained in the published agenda.

(d) The Joint Committee shall appoint an Executive Director who shall be the staff director. The Executive Director shall receive a salary to be fixed by the Joint Committee.

The Executive Director shall be authorized to employ and fix the compensation of such necessary professional, technical and secretarial staff and prescribe the duties of such staff.

(e) A permanent office of the Joint Committee shall be in the State Capitol Complex wherein the Space Needs Commission shall provide suitable offices. **(Added by PA 80-1035, effective September 27, 1977; Amended by PA 80-1457, effective January 1, 1979)**

Section 7.03. OATHS; AFFIDAVITS; SUBPOENA) (a) The Executive Director of the Joint Committee or any person designated by him may administer oaths or affirmations, take affidavits or depositions of any person.

(b) The Executive Director, upon approval of majority vote of the Joint Committee, or the presiding officers may subpeona and compel the attendance before the Joint Committee and examine under oath any person, or the production for the Joint Committee of any records, books, papers, contracts or other documents.

If any person fails to obey a subpoena issued under this Section, the Joint Committee may apply to any circuit court to secure compliance with the subpoena. The failure to comply with the order of the court issued in response thereto shall be punished as a contempt. **(Added by PA 80-1035, effective September 27, 1977)**

Section 7.04. POWERS OF JOINT COMMITTEE) The Joint Committee shall have the following powers under this Act:

1. The function of the Joint Committee shall be the promotion of adequate and proper rules by agencies and an understanding on the part of the public respecting such rules. Such function shall be advisory only, except as provided in Sections 7.06a and 7.07a.
2. The Joint Committee may undertake studies and investigations concerning rule-making and agency rules.
3. The Joint Committee shall monitor and investigate compliance of agencies with the provisions of this Act, make periodic investigations of the rule-making activities of all agencies, and evaluate and report on all rules in terms of their propriety, legal adequacy, relation to statutory authorization, economic and budgetary effects and public policy.
4. Hearings and investigations conducted by the Joint Committee under this Act may be held at such times and places within the State as such Committee deems necessary.
5. The Joint Committee shall have the authority to request from any agency an analysis of the:
   a. effect of a new rule, amendment or repealer, including any direct economic effect on the persons regulated by the rule; any anticipated effect on the proposing agency's budget and the budgets of other State agencies; and any anticipated effects on State revenues;
   b. agency's evaluation of the submissions presented to the agency pursuant to Section 5.01 of this Act;
   c. a description of any modifications from the initially published proposal made in the finally accepted version of the intended rule, amendment or repealer.
6. Failure of the Joint Committee to object to any proposed rule, amendment, or repealer or any existing rule shall not be construed as implying direct or indirect approval of the rule or proposed rule, amendment, or repealer by the Joint Committee or the General Assembly. **(Added by PA 80-1035, effective September 27, 1977; Amended by PA 81-1044, effective October 1, 1978; Amended by PA 81-1035, effective January 1, 1980; Amended by PA 81-1514, effective January 1, 1981)**

Section 7.05. RESPONSIBILITIES OF JOINT COMMITTEE) The Joint Committee shall have the following responsibilities under this Act:

1. The Joint Committee shall conduct a systematic and continuing study of the rules and rule-making process of all state agencies, including those agencies not covered in Section 3.01 of this Act, for the purpose of improving the rule-making process, reducing the number and bulk of rules, removing redundancies and unnecessary repetitions and correcting grammatical, typographical and like errors not affecting the construction or meaning of the rules, and it shall make recommendations to the appropriate affected agency.
2. The Joint Committee shall review the statutory authority on which any administrative rule is based.

3. The Joint Committee shall maintain a review program, to study the impact of legislative changes, court rulings and administrative action on agency rules and rulemaking.

4. The Joint Committee shall suggest rulemaking of an agency whenever the Joint Committee, in the course of its review of the agency's rules under this Act, determines that the agency's rules are incomplete, inconsistent or otherwise deficient. **(Added by PA 80-1035, effective September 27, 1977; Amended by PA 81-1044, effective October 1, 1979)**

Section 7.06. JOINT COMMITTEE OBJECTION TO PROPOSED RULE-MAKING) (a) The Joint Committee may examine any proposed rule, amendment to a rule, and repeal of a rule for the purpose of determining whether the proposed rule, amendment to a rule, or repeal of a rule is within the statutory authority upon which it is based, whether the rule, amendment to a rule or repeal of a rule is in proper form and whether the notice was given prior to its adoption, amendment, or repeal and was sufficient to give adequate notice of the purpose and effect of the rule, amendment or repeal.

(b) If the Joint Committee objects to a proposed rule, amendment to a rule, or repeal of a rule, it shall certify the fact to the issuing agency and include with the certification a statement of its specific objections.

(c) If within 45 days after notice of proposed rulemaking has been received by the Joint Committee, the Joint Committee certifies its objections to the issuing agency then that agency shall within 90 days of receipt of the statement of objection:

1. modify the proposed rule, amendment or repealer to meet the Joint Committee's objections;
2. withdraw the proposed rule, amendment, or repealer in its entirety, or;
3. refuse to modify or withdraw the proposed rule, amendment or repealer.

(d) If an agency elects to modify a proposed rule, amendment or repealer to meet the Joint Committee's objections, it shall make such modifications as are necessary to meet the objections and shall resubmit the rule, amendment or repealer to the Joint Committee. In addition, the agency shall submit a notice of its election to modify the proposed rule, amendment or repealer to meet the Joint Committee's objections to the Secretary of State, which notice shall be published in the first available issue of the Illinois Register, but the agency shall not be required to conduct a public hearing. If the Joint Committee determines that the modifications do not remedy the Joint Committee's objections, it shall so notify the agency in writing and shall submit a copy of such notification to the Secretary of State for publication in the next available issue of the Illinois Register. In addition, the Joint Committee may recommend legislative action as provided in subsection (g) for agency refusals.

(e) If an agency elects to withdraw a proposed rule, amendment or repealer as a result of the Joint Committee's objections, it shall notify the Joint Committee, in writing, of its election and shall submit a notice of the withdrawal to the Secretary of State which shall be published in the next available issue of the Illinois Register.

(f) Failure of an agency to respond to the Joint Committee's objections to a proposed rule, amendment or repealer, within the time prescribed in subsection (c) shall constitute withdrawal of the proposed rule, amendment or repealer in its entirety. The Joint Committee shall submit a notice to that effect to the Secretary of State which shall be published in the next available issue of the Illinois Register and the Secretary of State shall refuse to accept for filing a certified copy of such proposed rule, amendment or repealer under the provisions of Section 6.

(g) If an agency refuses to modify or withdraw the proposed rule, amendment or repealer so as to remedy an objection stated by the Joint Committee, it shall notify the Joint Committee in writing of its refusal and shall submit a notice of refusal to the Secretary of State which shall be published in the next available issue of the Illinois Register. If the Joint Committee decides to recommend legislative action in response to an agency refusal, then the Joint Committee shall have drafted and have introduced into either house of the General Assembly appropriate legislation to implement the recommendations of the Joint Committee.

(h) No rule, amendment or repeal of a rule shall be accepted by the Secretary of State for filing under Section 6, if such rule-making is subject to this Section, until after the agency has responded to the objections of the Joint Committee as provided in this Section. **(Added by PA 80-1035, effective September 27, 1977; Amended by PA 81-1044, effective October 1, 1979)**

Section 7.06a. LEGISLATIVE VETO OF PROPOSED RULEMAKING) (a) If the Joint Committee determines that adoption and effectiveness of a proposed rule, amendment or repealer or portion of a proposed rule, amendment or repealer by an agency would be objectionable under any of the standards for the Joint Committee's review specified in Sections 7.04, 7.05, 7.07 or 7.08 of this Act and would constitute a serious threat to the public interest, safety or welfare, the Joint Committee may at any time prior to the taking effect of such proposed rule, amendment or repealer issue a statement to that effect. Such statement may be issued by the Joint Committee only upon the affirmative vote of three-fifths of the members appointed to the Joint Committee. A certified copy of such statement shall be transmitted to the proposing agency and to the Secretary of State for publication in the next available issue of the Illinois Register.

(b) The proposed rule, amendment or repealer or the portion of the proposed rule, amendment or repealer to which the Joint Committee has issued a statement under subsection (a) shall not be accepted for filing by the Secretary of State nor take effect for at least 180 days from receipt of the statement by the Secretary of State. The agency may not enforce or invoke for any reason a proposed rule, amendment or repealer or any portion thereof which is prohibited from being filed by this subsection during this 180 day period.

(c) The Joint Committee shall, as soon as practicable after the issuance of a statement under subsection (a), introduce in either house of the General Assembly a joint resolution stating that the General Assembly desires to continue the prohibition of the proposed rule, amendment or repealer or the portion thereof to which the statement was issued from being filed and taking effect. If such a joint resolution is passed by both houses of the General Assembly within the 180 day period provided in subsection (b), the agency shall be prohibited from filing the proposed rule, amendment or repealer or the portion thereof and the proposed rule, amendment or repealer or the portion thereof shall not take effect. The Secretary of State shall not accept for filing the proposed rule, amendment or repealer or the portion thereof which the General Assembly has prohibited the agency from filing as provided in this subsection. If the 180 day period provided in subsection (b) expires prior to passage of the joint resolution, the agency may file the proposed rule, amendment or repealer or the portion thereof as adopted and it shall take effect. **(Added by PA 81-1514, effective January 1, 1981)**

Section 7.07. JOINT COMMITTEE OBJECTION TO EXISTING RULE) (a) The Joint Committee may examine any rule for the purpose of determining whether the rule is within the statutory authority upon which it is based, and whether the rule is in proper form.

(b) If the Joint Committee objects to a rule, it shall, within 5 days of the objection, certify the fact to the adopting agency and include within the certification a statement of its specific objections.

(c) Within 90 days of receipt of the certification, the agency shall:
1. Notify the Joint Committee that it has elected to amend the rule to meet the Joint Committee's objection;
2. Notify the Joint Committee that it has elected to repeal the rule, or;
3. Notify the Joint Committee that it refuses to amend or repeal the rule.

(d) If the agency elects to amend a rule to meet the Joint Committee's objections, it shall notify the Joint Committee in writing and shall initiate rule-making procedures for that purpose by giving notice as required by Section 5 of this Act. The Joint Committee shall give priority to rules so amended when setting its agenda.

(e) If the agency elects to repeal a rule as a result of the Joint Committee objections, it shall notify the Joint Committee, in writing, of its election and shall initiate rule-making procedures for that purpose by giving notice as required by Section 5 of this Act.

(f) If the agency elects to amend or repeal a rule as a result of the Joint Committee objections, it shall complete the process within 180 days after giving notice in the Illinois Register.

(g) Failure of the agency to respond to the Joint Committee's objections to a rule within the time prescribed in subsection (c) shall constitute a refusal to amend or repeal the rule.

(h) If an agency refuses to amend or repeal a rule so as to remedy an objection stated by the Joint Committee, it shall notify the Joint Committee in writing of its refusal and shall submit a notice of refusal to the Secretary of State which shall be published in the next available issue of the Illinois Register. If the Joint Committee, in response to an agency refusal, decides to recommend legislative action, then the Joint Committee shall have drafted and have introduced into either house of the General Assembly appropriate legislation to implement the recommendations of the Joint Committee. **(Added by PA 80-1035, effective September 27, 1977; Amended by PA 81-1044, effective October 1, 1979)**

Section 7.07a. LEGISLATIVE SUSPENSION OF EMERGENCY AND PEREMPTORY RULES) (a) If the Joint Committee determines that a rule or portion of a rule adopted under Sections 5.02 or 5.03 of this Act is objectionable under any of the standards for the Joint Committee's review specified in Sections 7.04, 7.05, 7.06, 7.07, or 7.08 of this Act and constitutes a serious threat to the public interest, safety or welfare, the Joint Committee may issue a statement to that effect. Such statement may be issued by the Joint Committee only upon the affirmative vote of three-fifths of the members appointed to the Joint Committee. A certified copy of such statement shall be transmitted to the affected agency and to the Secretary of State for publication in the next available issue of the Illinois Register.

(b) The effectiveness of the rule or the portion of a rule shall be suspended immediately for at least 180 days upon receipt of the certified statement by the Secretary of State. The Secretary of State shall indicate such suspension prominently and clearly on the face of the affected rule or the portion of a rule filed in the Office of the Secretary of State. Rules or portions of rules suspended in accordance with this subsection shall become effective again upon the expiration of 180 days from receipt of the statement by the Secretary of State if the General Assembly does not continue the suspension as provided in subsection (c). The agency may not enforce, nor invoke for any reason, a rule or portion of a rule which has been suspended in accordance with this subsection. During the 180 days period, the agency may not file, nor may the Secretary of State accept for filing, any rule having substantially the same purpose and effect as rules or portions of rules suspended in accordance with this subsection.

(c) The Joint Committee shall, as soon as practicable after issuance of a statement under subsection (a), cause to be introduced in either house of the General Assembly a joint resolution stating that the General Assembly desires to continue the suspension of effectiveness of a rule or the portion of the rule to which the statement was issued. If such a joint resolution is passed by both houses of the General Assembly within the 180 day period provided in subsection (b), the rule or the portion of the rule shall be considered repealed and the Secretary of State shall immediately remove such rule or portion of a rule from the collection of effective rules. **(Added by PA 81-1514, effective January 1, 1981)**

Section 7.08. PERIODIC EVALUATION BY JOINT COMMITTEE) (a) The Joint Committee shall evaluate the rules of each agency at least once every 5 years. The Joint Committee by rule shall develop a schedule for this periodic evaluation. In developing this schedule the Joint Committee shall group rules by specified areas to assure the evaluation of similar rules at the same time. Such schedule shall include at least the following categories:

1. human resources;
2. law enforcement;
3. energy;
4. environment;
5. natural resources;
6. transportation;
7. public utilities;
8. consumer protection;
9. licensing laws;
10. regulation of occupations;
11. labor laws;
12. business regulation;
13. financial institutions; and
14. government purchasing.

(b) Whenever evaluating any rules as required by this Section the Joint Committee's review shall include an examination of:

1. organizational, structural and procedural reforms which effect rules or rule-making;
2. merger, modification, establishment or abolition of regulations;
3. eliminating or phasing out outdated, overlapping or conflicting regulatory jurisdictions or requirements of general applicability; and
4. economic and budgetary effects. **(Added by 80-1035, effective September 27, 1977; Amended by PA 81-1035, effective January 1, 1980)**

Section 7.09. JOINT COMMITTEE RULE-MAKING) The Joint Committee shall have the authority to adopt rules to administer the provisions of this Act relating to the Joint Committee's responsibilities, powers and duties. **(Added by PA 80-1035, effective September 27, 1977)**

Section 7.10. REPORT BY JOINT COMMITTEE) The Joint Committee shall report its findings, conclusions and recommendations including suggested legislation to the General Assembly by February 1 of each year. **(Added by PA 80-1035, effective September 27, 1977)**

Section 8. PETITION FOR ADOPTION OF RULES) Any interested person may petition an agency requesting the promulgation, amendment or repeal of a rule. Each agency shall prescribe by rule the form for petitions and the procedure for their submission, consideration and disposition. If, within 30 days after submission of a petition, the agency has not initiated rule-making proceedings in accordance with Section 5 of this Act, the petition shall be deemed to have been denied. **(PA 79-1083)**

Section 9. DECLARATORY RULINGS BY AGENCY) Each agency may in its discretion provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. Declaratory rulings shall not be appealable. **(PA 79-1083)**

Section 10. CONTESTED CASES; NOTICE; HEARING) (a) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice. Such notice shall be served personally or by certified or registered mail upon such parties or their agents appointed to receive service of process and shall include:

1. a statement of the time, place and nature of the hearing;
2. a statement of the legal authority and jurisdiction under which the hearing is to be held;
3. a reference to the particular Sections of the statutes and rules involved; and
4. except where a more detailed statement is otherwise provided for by law, a short and plain statement of the matters asserted.

(b) Opportunity shall be afforded all parties to be represented by legal counsel, and to respond and present evidence and argument.

(c) Unless precluded by law, disposition may be made of any contested case by stipulation, agreed settlement, consent order or default. **(PA 79-1083)**

Section 11. RECORD IN CONTESTED CASES) (a) The record in a contested case shall include:

1. all pleadings (including all notices and responses thereto), motions, and rulings;
2. evidence received;
3. a statement of matters officially noticed;
4. offers of proof, objections and rulings thereon;
5. proposed findings and exceptions;
6. any decision, opinion or report by the hearing examiner;
7. all staff memoranda or data submitted to the hearing examiner or members of the agency in connection with their consideration of the case; and
8. any communciation prohibited by Section 14 of this Act, but such communications shall not form the basis for any finding of fact.

(b) Oral proceedings or any part thereof shall be recorded stenographically or by such other means as to adequately insure the preservation of such testimony or oral proceedings and shall be transcribed on request of any party.

(c) Findings of fact shall be based exclusively on the evidence and on matters officially noticed. **(PA 79-1083)**

Section 12. RULES OF EVIDENCE; OFFICIAL NOTICE) In contested cases:

(a) Irrelevant, immaterial or unduly repetitious evidence shall be excluded. The rules of evidence and privilege as applied in civil cases in the Circuit Courts of this State shall be followed. However, evidence not admissible under such rules of evidence may be admitted (except where precluded by statute) if it is a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced, any part of the evidence may be received in written form.

(b) Subject to the evidentiary requirements of subsection (a) of this Section, a party may conduct cross-examination required for a full and fair disclosure of the facts.

(c) Notice may be taken of matters of which the Circuit Courts of this State may take judicial notice. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence. **(PA 79-1083)**

Section 13. PROPOSAL FOR DECISION) Except where otherwise expressly provided by law, when in a contested case a majority of the officials of the agency who are to render the final decision has not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency, shall not be made until a proposal for decision is served upon the parties, and an opportunity is afforded to each party adversely affected to file exceptions and to present a brief and, if the agency so permits, oral argument, to the agency officials who are to render the decision. The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact or law necessary to the proposed decision, prepared by the persons who conducted the hearing or one who has read the record. **(PA 79-1083)**

Section 14. DECISIONS AND ORDERS) A final decision or order adverse to a party (other than the agency) in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, spearately stated. Finding of fact, if set forth in statutory langauge, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties or their agents appointed to receive service of process shall be notified either personally or by registered or certified mail of any decision or order. Upon request a copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

A decision by any agency in a contested case under this Act shall be void unless the proceedings are conducted in compliance with the provisions of this Act relating to contested cases except to the extent such provisions are waived pursuant to Section 18 of this Act and except to the extent the agency has adopted its own rules for contested cases as authorized in Section 2 of this Act. **(PA 79-1083; Amended by PA 80-1035, effective September 27, 1977)**

Section 15. EX PARTE CONSULTATIONS) Except in the disposition of matters which they are authorized by law to entertain or dispose of on an ex parte basis, neither agency members, employees nor hearing examiners shall, after notice of hearing in a contested case or licensing to which the procedures of a contested case apply under this Act, communicate, directly or indirectly, in connection with any issue of fact, with any person or party, or in connection with any other issue with any party or his representative, except upon notice and opportunity for all parties to participate. However, an agency member may communicate with other members of the agency, and an agency member or hearing examiner may have the aid and advice of one or more personal assistants. **(PA 79-1083; Amended by PA 80-1035, effective September 27, 1977)**

Section 16. LICENSES) (a) When any licensing is required by law to be preceded by notice and opportunity for hearing, the provisions of this Act concerning contested cases shall apply.

(b) When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license shall continue in full force and effect until the final agency decision on the application has been made unless a later date is fixed by order of a reviewing court.

(c) No agency shall revoke, suspend, annul, withdraw, amend materially, or refuse to renew any valid license without first giving written notice to the licensee of the facts or conduct upon which the agency will rely to support its proposed action, and an opportunity for hearing in accordance with the provisions of this Act concerning contested cases. At any such hearing, the licensee shall have the right to show compliance with all lawful requiremnts for the retention, or continuation or renewal of the license. If, however, the agency finds that the public interest, safety or welfare imperatively requires emergency action, and if the agency incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action which proceedings shall be promptly instituted and determined.

Any application for renewal of a license which contains required and relevant information, data, material or circumstances which were not contained in an application for the existing license, shall be subject to the provisions of Section 16(a) of this Act. **(PA 79-1083; Amended by PA 80-1035, effective September 27, 1977)**

Section 17. RATE-MAKING) Every agency which is empowered by law to engage in rate-making activities shall establish by rule, not inconsistent with the provisions of law establishing such rate-making jurisdiction, the practice and procedure to be followed in rate-making activities before such agency. **(PA 79-1083)**

Section 18. WAIVER) Compliance with any or all of the provisions of this Act concerning contested cases may be waived by written stipulation of all parties. **(PA 79-1083)**

Section 19. (PA 79-1083; Repealed as of January 1, 1978, by PA 80-1035, effective September 27, 1977)

Section 20. SEVERABILITY) If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are severable. **(PA 79-1083)**

Section 21. EFFECTIVE DATE) This Act takes effect upon its becoming a law. **(PA 79-1083, effective September 22, 1975)**

Statement of the National Association of Counties (NACo) Submitted to the United States Senate, Committee on Governmental Affairs, on "The Regulatory Reform Act" (S.1080), June 23, 1981, Washington, D.C.

Chairman Roth, and distinguished members of the Governmental Affairs Committee, the National Association of Counties* (NACo) is pleased to submit our comments on S. 1080, "The Regulatory Reform Act of 1980." We offer the concerns of more than 3,000 county governments who review meaningful regulatory reform as one of the most crucial issues before this Congress. It is our sincere hope that this Committee will seriously debate the intergovernmental issues discussed in our statement since it is our belief that the intergovernmental significance of regulatory reform has not received comprehensive review in either house of the Congress. Last Congress, NACo sent a letter to then Chairman Abraham Ribicoff asking that the Congress focus on regulatory burdens in the public arena. We attach this letter, dated April 9, 1979, because our arguments still have merit. More importantly, it remains necessary to further remind Congress of state/local government problems with regards to government regulations. Though this Congress has not focused its attention on the consumer side of regulatory relief, it has spent considerable time, as has the President, on regulatory relief to the private sector or business community. It is our hope that this, and similar statements offered by organizations representing state and local government will result in amending S. 1080 to reflect the concerns

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* The National Associaton of Counties is the only national organization representing county government in the United States. Through its membership, urban, subruban and rural counties join together to build effective, responsive county governments. The goals of the organization are: to improve county government; to serve as the national spokesman for county governments; to act as a liaison between the nation's counties and other levels of government; and to achieve public understanding of the role of counties in the federal system.

OF GOVERNMENT AND PROVIDE APPROPRIATE LEGISLATIVE HISTORY TO ENSURE THE PROPER PROTECTIONS AND RIGHTS OF STATE/LOCAL GOVERNMENTS IN FEDERAL RULEMAKING, BOTH FORMAL AND INFORMAL.

NACo WHOLEHEARTEDLY SUPPORTS CONGRESSIONAL AND ADMINISTRATION EFFORTS TO BRING REFORM ISSUES TO AN OPEN FORUM. IT IS OUR SINCERE HOPE THAT REFORMS, PARTICULARLY THOSE SYSTEMIC IN NATURE, WILL BE ENACTED BY THE CONGRESS. WE SUPPORT VICE PRESIDENT BUSH'S TASK FORCE EFFORT. BUT FRANKLY, COUNTIES BELIEVE STRONGLY THAT INDIVIDUAL REGULATORY ACTIONS, AS THE BUSH PROGRAM EMPHASIZES, ARE NOT ENOUGH. THE PROCESS THROUGH WHICH RULES ARE DEVELOPED AND IMPLEMENTED MUST BE CHANGED.

S. 1080 IS ONLY A STEP IN THE RIGHT DIRECTION. AMENDMENTS MUST BE MADE IF THIS, OR ANY, REGULATORY REFORM BILL IS TO HONESTLY AFFECT REGULATORY RELIEF TO STATE AND LOCAL GOVERNMENTS.

IMPACT OF REGULATIONS ON COUNTY GOVERNMENT

THE FACT THAT GOVERNMENT REGULATIONS CAN AND HAVE HAD A NEGATIVE EFFECT ON LOCAL GOVERNMENT OPERATIONS IS NOT NEW. NUMEROUS STUDIES HAVE SHOWN THAT FEDERAL REGULATIONS SKEW LOCAL PRIORITIES, FRUSTRATE EFFICIENT MANAGEMENT AND WASTE RESOURCES AS A RESULT OF DUPLICATION OR "OVER PRESCRIPTIVENESS." TOO OFTEN, THEY CAUSE LOCAL GOVERNMENTS TO CREATE NEW STAFF POSITIONS WHICH BOLSTER THE ALREADY GROWING STATE AND LOCAL BUREAUCRACY. STATE AND LOCAL LEGISLATIVE BODIES OFTEN MUST RESPOND THROUGH LEGISLATING NEW LAWS OR PROCEDURES FURTHER COMPOUNDING THE REGULATORY BURDEN.

CONGRESS, TOO, HAS ADDED TO THE PROBLEM THROUGH LEGISLATING INCONSISTENT POLICIES. NEARLY FIFTY PERCENT OF THE REGULATORY BURDEN FOUND WITHIN THE COMPREHENSIVE EMPLOYMENT AND TRAINING ACT (CETA), IS A RESULT OF CONGRESS, NOT FEDERAL AGENCY INTERPRETATION OR DECISIONS. CONGRESS HAS CREATED DIFFERENT, YET ESSENTIALLY THE SAME, ELIGIBILITY CRITERIA UNDER EACH TITLE OF THE ACT WHICH FORCES LOCAL PRIME SPONSORS TO COMPUTE EACH PROGRAM INDIVIDUALLY AND MAINTAIN SEPARATE MANAGEMENT SYSTEMS. THE LAW ESTABLISHES THREE SEPARATE ADVISORY COUNCILS. UNDER SECTION 676.75-3(D)(1) CETA AUTHORIZATION REQUIRES PRIME SPONSORES TO IMMEDIATELY TERMINATE PARTICIPANTS DETERMINED TO BE INELIGIBLE. YET SECTION 676.30(A)(2) REQUIRES PARTICIPANTS TO BE TERMINATED IN ACCORDANCE WITH PROCEDURES AND LEGAL PROTECTION AFFORDED SIMILARLY EMPLOYED NON-CETA WORKERS. THIS CONTRADICTION IN LAW RESULTS IN GRIEVANCES AND LAWSUITS AGAINST PRIME SPONSORS. THE SUBSEQUENT LEGAL FEES ARE ONLY A SMALL PART OF THE PROBLEM. WITH NEWLY EXPANDED LIABILITY OF PUBLIC OFFICIALS, INCONSISTENT FEDERAL POLICIES VIRTUALLY ASSURE COURT ACTIONS WHICH IMPEDE LOCAL GOVERNMENTS' WILLINGNESS TO ACCEPT THE MANAGEMENT OF FEDERAL PROGRAMS OR PARTICULAR SERVICES.

THIS PAST SPRING, THE URBAN INSTITUTE PUBLISHED THE RESULTS OF A STUDY IT COMPLETED ON THE IMPACT OF FEDERAL RULEMAKING IN SIX MAJOR PROGRAM AREAS: CLEAN WATER ACT AMENDMENTS OF 1972 AND 1977; AMENDMENTS TO THE UNEMPLOYMENT INSURANCE COMPENSATION ACT; BILINGUAL EDUCATION REQUIREMENTS; EDUCATION OF THE HANDICAPPED (CHILDREN); TRANSIT ACCESSIBILITY REQUIREMENTS FOR HANDICAPPED; AND DAVIS BACON. SEVEN JURISDICTIONS WERE USED TO COMPILE THE INFORMATION. EXCLUDING ADMINISTRATIVE OR OVERHEAD COSTS, OPERATING COSTS UNDER FIVE OF THE SIX PROGRAMS TOTALED $51.9 MILLION IN 1978, OR $19 FOR EVERY RESIDENT OF THE PARTICIPATING JURISDICTIONS. THE CAPITAL COSTS INCURRED TOTALED $113.5 MILLION. WHEN CAPITAL OUTLAYS WERE AMORTIZED OVER A

TWENTY YEAR PERIOD AT 8 PERCENT INTEREST AND THEN ADDED TO THE OPERATING COSTS, THE PER CAPITA COSTS JUMP TO TWENTY FIVE DOLLARS. ON THE AVERAGE, THIS FIGURE REPRESENTS THE SAME AMOUNT, PER CAPITA, RECEIVED BY THE JURISDICTION FROM THE GENERAL REVENUE SHARING PROGRAM. IN THIS SENSE, GRS SIMPLY REIMBURSES LOCAL COSTS IN MEETING COMPLIANCE WITH FIVE OF FIFTY-NINE CROSSCUTTING FEDERAL MANDATES.

AS A RESULT OF TOWN MEETINGS ACROSS THE COUNTRY, NACo HAS COLLECTED A GREAT DEAL OF INFORMATION ON SPECIFIC RULES REQUIRING CHANGE. THE LIST IS ENDLESS. BUT EXAMPLES, BY THEMSELVES, DO NOT PROVIDE SOLUTIONS FOR THE UNDERLYING PROBLEMS INHERENT IN THE PRESENT RULEMAKING PROCESS. CASE WORK IS NECESSARY, BUT IS NOT THE FINAL SOLUTION. A FINAL SOLUTION CAN BE FOUND ONLY IN A COMPREHENSIVE PROCESS WHICH EMPHASIZES EARLY AND TOTAL CONSULTATION WITH STATE AND LOCAL GOVERNMENT OFFICIALS, CONSIDERATION OF THE FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT OPERATIONS; AND CONSIDERATION OF RECIPIENTS' CAPACITIES, I.E., SIZE, TYPE OF RECIPIENT, WHETHER IT BE URBAN OR RURAL; A GOVERNMENT OR UNIVERSITY, HIGH RISK OR LOW RISK GRANTEE.

THESE PRINCIPLES OR GUIDELINES SHOULD FORM THE MOST BASIC PREMISE OF ANY NEW REGULATORY PROCESS.

A NEW REGULATORY PROCESS

UNDER THE INTERGOVERNMENTAL COOPERATION ACT, 42 U.S.C. SS4201 ET SEQ, THE CONGRESS REQUIRED:

> "ALL VIEWPOINTS, NATIONAL, REGIONAL, STATE AND LOCAL, SHALL, TO THE EXTENT POSSIBLE, BE FULLY CONSIDERED AND TAKEN INTO ACCOUNT IN PLANNING FEDERAL OR FEDERALLY ASSISTED DEVELOPMENT PROGRAMS AND PROJECTS. STATE AND LOCAL GOVERNMENT OBJECTIVES . . . SHALL BE CONSIDERED AND EVALUATED WITHIN A FRAMEWORK OF NATIONAL PUBLIC

> OBJECTIVES AS EXPRESSED IN FEDERAL LAW . . . NEEDS OF REGIONS, STATES, AND LOCALITIES SHALL BE CONSIDERED IN PLAN FORMULATION EVALUATION AND REVIEW."

THE ACT SPECIFICALLY NAMES NATIONAL ORGANIZATIONS OF ELECTED STATE AND LOCAL OFFICIALS. YET RECENT COURT INTERPRETATIONS HAVE IMPEDED THE FULL IMPLEMENTATION OF CONGRESS' INTENT TO FULLY INVOLVE STATE AND LOCAL GOVERNMENT OFFICIALS IN THE RULEMAKING PROCESS. RESTRICTIONS HAVE BEEN PLACED UTILIZING THE FEDERAL ADVISORY COMMITTEE ACT OF 1972 (FACA) WHICH LEGISLATIVE HISTORY CLEARLY SHOWS IS IN INAPPROPRIATE APPLICATION OF THE ACT. NACO URGES THE CONGRESS TO AMEND S. 1080 TO CLARIFY ITS INTENT; AND OFFERS FOR THE COMMITTEE'S CONSIDERATION THE FOLLOWING LANGUAGE TO AMEND TITLE 5.

- REMOVAL OF NON-NEGOTIATING ASPECTS OF FEDERAL RULEMAKING

  (A) STATE AND LOCAL GOVERNMENTS, ELECTED OFFICIALS THEREOF, THEIR STAFFS AND REPRESENTATIVES, SHALL BE CONSULTED FOR THE PURPOSES OF ANY RULEMAKING UNDER 5 U.S.C. 553 WHICH MAY HAVE ANY EFFECT ON OR APPLY TO ANY STATE OR LOCAL GOVERNMENT. FOR THE PURPOSE OF THIS CONSULTATION A FEDERAL AGENCY MAY MEET AT ANY TIME WITH SUCH PERSONS BEFORE OR DURING THE COMMENT PERIOD ON A PROPOSED RULEMAKING. ANY SUCH MEETINGS ARE NOT TO BE CONSTRUED TO FALL UNDER THE PROVISIONS OF 5 U.S.C. APPENDIX I [FEDERAL ADVISORY COMMITTEE ACT (FACA)]. A FEDERAL AGENCY, AT ITS DISCRETION, MAY MAKE PUBLIC NOTICE OF SUCH MEETINGS, MAY OPEN SUCH MEETINGS TO THE PUBLIC, OR FOLLOW ANY OF THE PROCEDURES AND REQUIREMENTS PURSUANT TO 5 U.S.C. APPENDIX I.

(B) PAPERS AND OTHER DOCUMENTS MADE AVAILABLE DURING ANY MEETINGS HELD UNDER (A) ABOVE, SHALL BE MADE PART OF THE RECORD FOR THE APPLICABLE RULEMAKING. SUCH MEETING, PER SE, SHALL NOT PREJUDICE THE INTERPRETATION OF THE RECORD IN ANY MANNER."

WITH CONSULTATION AS THE BASIC PREMISE, THE NATIONAL ASSOCIATION OF COUNTIES OFFERS THE FOLLOWING PRINCIPLES WHICH MUST BE INCLUDED IN ANY NEW REGULATORY PROCESS IF IT IS TO HAVE ANY SUBSTANTIVE OR MAJOR EFFECT ON INTERGOVERNMENTAL RULEMAKING:

ANY NEW LEGISLATION SHOULD PROVIDE FOR

1. COST BENEFIT ANALYSIS - A REASONABLE RELATIONSHIP SHOULD BE DETERMINED BETWEEN COST AND BENEFIT. AGENCIES SHOULD INVOLVE STATE AND LOCAL OFFICIALS IN THE DETERMINATION AS STUDIES HAVE SHOWN AGENCY TENDENCY TO UNDERESTIMATE TOTAL IMPACT OF A RULE. VARYING METHODS TO ACHIEVE THE SAME OBJECTIVE SHOULD BE DEVELOPED AND ALLOWED IN RECIPIENT PRACTICES, PROVIDED THEY MEET THE GENERAL INTENT OF THE LAW.
2. A PROCESS TO EFFECTIVELY VETO, BY OMB OR SOME OTHER CENTRAL AGENCY, ANY NEWLY PROPOSED RULE FOUND TO BE DUPLICATIVE.

   AT A VERY MINIMUM, OMB SHOULD HAVE THE AUTHORITY TO TEMPORARILY SUSPEND A RULE IF DUPLICATION OR INCONSISTENCIES ARE DISCOVERED. A NEGOTIATING PROCESS SHOULD BE PURSUED TO ELIMINATE INCONSISTENCIES AND/OR OVERLAPPING REQUIREMENTS.
3. AN INDEPENDENT APPEALS BOARD SHOULD BE DEVELOPED TO HANDLE DISPUTES BETWEEN AGENCY AND RECIPIENT, AS WELL AS AGENCY WITH AGENCY. SUCH A PROCESS WILL MOST ASSUREDLY BE NEEDED TO IRON OUT RULE PROBLEMS ONCE BLOCK GRANTS ARE ENACTED.

4. PERIODIC REVIEW OF ALL REGULATIONS FOR THE PURPOSE OF SUNSETTING UNNECESSARY RULES ON AT LEAST A FIVE-YEAR CYCLE.
5. CONGRESSIONAL AUTHORITY TO VETO REGULATIONS FOUND TO BE CONTRARY TO CONGRESSIONAL INTENT. A PROCESS SHOULD BE DEVELOPED WHERE SPECIFICS AND SPEEDY PROCEDURES ARE USED. THE VETO SHOULD REQUIRE POSITIVE ACTION BY BOTH HOUSES OF CONGRESS. THE PROCEDURE SHOULD NOT TREAT VETO LEGISLATION AS ANY OTHER SIMPLE BILL.
6. INCLUSION OF GENERAL GUIDELINES, FORMULA DETERMINATIONS, AND GRANT MANUALS OR OPERATING POLICIES AS COVERED UNDER FORMAL RULEMAKING PROCESS. CONSEQUENTLY, THEY SHOULD FALL UNDER NOTICE AND COMMENT PROVISIONS. AGENCIES SHOULD BE REQUIRED TO CONSIDER TIERED REQUIREMENTS WHERE RECIPIENT CAPACITIES, THAT IS, SIZE, MANAGEMENT CAPACITIES, URBAN OR RURAL, WOULD BE REFLECTED IN THE RULES APPLIED TO A PARTICULAR JURISDICTION. THE AGENCY SHOULD HAVE THE AUTHORITY TO WAIVE A PARTICULAR REQUIREMENT FOR JUST CAUSE.
7. AGENCY CONSULTATION OF RECIPIENTS TO ASSIST THEM IN MEETING COMPLIANCE. TECHNICAL ASSISTANCE SHOULD BE OFFERED BEFORE PENALTIES ARE ASSIGNED. AGENCIES SHOULD NOT BE ALLOWED TO PRESCRIBE A PENALTY UNLESS RECIPIENT, AFTER CONSULTATION, HAS MADE NO ATTEMPT TO COME INTO COMPLIANCE WITH THE RULE.
8. EMPHASIZES AVOIDANCE OF COURT CASES AS LONG AS POSSIBLE. LITIGATION IS EXPENSIVE AND INDUCES HARDSHIP ON THE RECIPIENT. WHERE WRONG DOING HAS NOT BEEN FOUND, THE GRANTEE SHOULD BE REIMBURSED FOR THE COST OF THE CASE, INCLUDING XEROXING COSTS, TRAVEL EXPENSES, AND THE LIKE.

9. NON-COMPLIANCE BURDEN OF PROOF SHALL REST WITH THE FEDERAL AGENCY.
10. REMOVAL OF THE EXEMPTION OF GRANTS, CONTRACT, LOANS, AND COOPERATIVE AGREEMENTS, UNDER SECTION 553 OF TITLE 5 SHALL NOT RESULT IN PASSING THE PROVISIONS OF THE APA ON STATE AND/OR LOCAL GOVERNMENT OPERATIONS, INCLUDING THOSE OPERATIONS MANAGING OR IMPLEMENTING FEDERAL ASSISTANCE PROGRAMS.
11. ALL NOTICE REQUIREMENTS SHOULD INCLUDE:
    (A) A CLEAR STATEMENT OF FEDERAL INTEREST AND AUTHORITY WITH RESPECT TO FISCAL AND ORGANIZATIONAL IMPACTS AND GENERAL REQUIREMENTS FOR CHANGES IN LAWS AND REGULATIONS OF STATE AND LOCAL GOVERNMENTS, AND
    (B) A CONCISE LISTING OF EACH AND ALL CITES OF THE RULEMAKING HAVING SUCH EFFECT, WITH NOTATION OF THE APPLICABLE STANDARD INDUSTRIAL CLASSIFICATION (SIC) CODE FOR EACH SUCH CITE.
    (C) A REGULATORY AGENDA WHICH INCLUDES A SEPARATE SECTION FOR RULES IMPACTING STATE AND LOCAL GOVERNMENT.
12. WHENEVER A FEDERAL AGENCY CHANGES RULES, RECIPIENTS HAVING A SUBSTANTIAL MANAGEMENT OR FINANCIAL INVESTMENT IN COMPLYING WITH THE FORMER RULE MAY RETAIN THE FORMER PROVISIONS WITHOUT PENALTY.

REMOVAL OF EXEMPTION UNDER SEC. 553

REMOVAL OF EXEMPTION OF CONTRACT, GRANTS, LOANS AND COOPERATIVE AGREEMENTS UNDER SECTION 553 IS WELL INTENDED. HOWEVER, CAUTION MUST BE TAKEN TO ENSURE THAT COURT ACTION DOES NOT CONSTRUE THAT PROVISIONS ESTABLISHED UNDER APA BE EXTENDED TO STATE OR LOCAL GOVERNMENT OPERATIONS. WITHOUT PROPER PROTECTION, APPLICATION OF THE APA TO LOCAL OPERATING POLICIES WOULD SERIOUSLY HAMPER THE DELIVERY SYSTEM, MORE IMPORTANTLY, IT WOULD FURTHER OPEN LOCAL GOVERNMENT LIABILITY. INCREASED LITIGATION WOULD RESULT.

AT LEAST 38 STATES HAVE THEIR OWN ADMINISTRATIVE PROCEDURE LAWS OR GENERAL PRACTICES. THE FEDERAL APA SHOULD NOT BE CONSTRUED TO HAVE AN EFFECT ON SUCH LAWS, AND SHOULD NOT BE APPLIED TO FREEMPT THE EXERCISE OF THIS LEGAL AUTHORITY EVEN FOR THOSE STATE AND LOCAL RULEMAKINGS WHICH MAY BE NECESSARY TO MEET THE CONDITIONS OF FEDERAL FUNDING. THESE RULEMAKINGS BY STATE OFFICIALS, FOR EXAMPLE, STILL MUST MEET THE STATE'S OWN LAWS OF PROCEDURE.

EVEN WHEN A STATE OR LOCAL GOVERNMENT OPERATES UNDER THE MANDATES AND CONDITIONS OF FEDERAL FUNDS ITS OFFICIALS ACT UNDER THE AUTHORITY CONFERRED BY THEIR OWN LAWS AND CONSTITUTIONS. ANY ADMINISTRATIVE CHALLENGE OR DISPUTE ARISING FROM THE ACTIONS OF THESE OFFICIALS SHOULD BE SUBJECT TO THE ADMINISTRATIVE PROCESURES OF THE AUTHORIZING GOVERNMENT. SHOULD A FEDERAL AGENCY WISH TO ASSUME PRIMARY JURISDICTION IN ANY SUCH CASE THEN IT SHOULD CLEARLY SET THIS OUT AS A CONDITION OF FUNDING, TO BE AGREED UPON BY THE STATE OR LOCAL GOVERNMENT. I WOULD HOPE THAT CONGRESS WOULD ADDRESS THIS AREA OF JURISDICTION TO CLARIFY THE EXTENT OF AUTHORITY THAT FEDERAL AGENCIES MAY EXERCISE AS ADJUDICATORS IN CASES OF THIRD PARTY DISPUTES AGAINST THE EXERCISE OF ANOTHER GOVERNMENT'S LEGAL AUTHORITIES. IT IS MY VIEW THAT FEDERAL AGENCIES MAY NOT ASSUME SUCH AUTHORITY IF SUCH A CONDITION HAD NOT BEEN CLEARLY SET OUT TO ALLOW A STATE OR LOCAL GOVERNMENT TO MAKE AN INFORMED CHOICE ON ACCEPTANCE.

THE LEGISLATIVE HISTORY SHOULD CLEARLY STATE THE INTENT AND SET CONFINES TO ENSURE APPROPRIATE COURT INTERPRETATION.

CONCLUSION

IN CONCLUSION, THE NATIONAL ASSOCIATION OF COUNTIES URGES CONGRESS' CONSIDERATION OF THE INTERGOVERNMENTAL SIDE OF RULEMAKING REFORM. WE CALL ON CONGRESS TO ENACT NEW LEGISLATION WHICH INCLUDES THE PRINCIPLES OFFERED WITHIN THIS STATEMENT. A NEW ATTITUDE MUST PREVAIL AMONG ALL FEDERAL AGENCIES WHICH DRAWS UPON A COOPERATIVE SPIRIT. THAT SPIRIT MUST TREAT STATE AND LOCAL GOVERNMENTS AS EQUAL PARTNERS IN FEDERAL RULEMAKING PROCESSES.

UNDER THE PRESENT SYSTEM, FEDERAL AGENCIES MAINTAIN BROAD DISCRETIONARY AUTHORITIES. PRESUMPTIVE VALIDITY, PRIMARY JURISDICTION, AND THE LACK OF COMMON ADMINISTRATIVE PROCESURES NOW GIVE FEDERAL BUREAUCRATS A STRANGE HOLD OVER STATE AND LOCAL GOVERNMENTS, THEIR LAW, REGULATIONS AND FISCAL AFFAIRS. A CLARIFICATION OF PRINCIPLES WITH REGARD TO THESE FEDERAL AGENCY ADMINISTRATIVE PROCESURES CAN FREE UP THE LEVELS OF GOVERNMENT FROM MUCH UNCERTAINTY AND ALLOW THEM TO EXERCISE THEIR AUTHORITIES IN AN UNBURDENED, COOPERATIVE MANNER TO PROVIDE SERVICES AND ASSISTANCE TO PEOPLE WE ALL SERVE.

WE BELIEVE THE TIME IS RIPE TO FINALLY ACHIEVE MEANINGFUL REFORM. COUNTIES, NATIONWIDE, CALL ON CONGRESS TO RESPONSIBLY RESPOND. REGULATORY REFORM, WITHOUT TRUE REFORMS WITHIN THE INTERGOVERNMENTAL ARENA HOLDS NO LONG-TERM BENEFIT, AND SERVES TO PERPETUATE GOVERNMENT WASTE, INEFFICIENCY, AND UNRESPONSIVENESS.

THE NATIONAL ASSOCIATION OF COUNTIES APPRECIATES THIS OPPORTUNITY TO PROVIDE OUR COMMENTS. THE NATIONAL ASSOCIATION OF COUNTIES' STAFF WILL BE HAPPY TO ANSWER ANY QUESTIONS.

National Association of Counties
Offices • 1735 New York Avenue N.W., Washington, D.C. 20006 • Telephone 202/785-9577

April 9, 1979

The Honorable Abraham A. Ribicoff
Committee on Governmental Affairs
United States Senate
337 Russell Senate Office Building
(Old Senate Office Building)
1st Street, N.E.
Washington, D.C. 20510

Dear Senator Ribicoff:

The Committee on Governmental Affairs is presently considering legislation to reform the regulatory process and amend the Administrative Procedures Act, S.262; S.755; S.93; and S.445. The National Association of Counties (NACo), the only national organization representing more than 3,000 county governments, is supportive of regulatory reform and seriously hopes that your committee consider the question of impact on state and local governments of ineffective and burdensome federal regulations.

In preliminary hearings last week, your committee discussed the impact of government regulation on the consumer with particular focus on the private sector. NACo wishes to point out that the impact of federal regulations on state and local governments significantly contributes to the fiscal hardship of the consumer in the form of increases in taxes, special levies and user fees. While a consumer can elect to boycott a particular product because of the cost, the citizen, under penalty of law, cannot refuse to pay taxes, special levies or user fees adjusted by state and local governments. The question of regulatory impact on the consumer must be considered in the overall context of both the private and public sector. Regulatory reform can assist state and local governments to hold down administrative costs in inflationary times. By holding down costs, state and local governments can provide maximum public service within the confines of existing tax structures. In some cases, it can make the difference in a decision to raise local taxes, hold them at the present level, or possibly reduce them.

County governments are profoundly concerned with the question of regulatory burdens placed on state and local governments. At our recent Legislative Conference, our Taxation and Finance Policy Steering Committee unanimously passed a resolution in support of regulatory reform. A copy of that resolution is attached for your information.

Page 2.

The Honorable Abraham A. Ribicoff
Committee on Governmental Affairs

We sincerely hope that your consideration of this important issue will also take into account questions arising from the regulatory burden on state and local governments. Counties believe in the partnership role of our federal process and recognize the important role we have in making government regulation effective and efficient.

If you have any questions regarding our policy, please feel free to contact Bruce Talley or Linda Church of the NACo staff at 785 - 9577.

Respectfully yours,

Bernard F. Hillenbrand
Executive Director

Attachment
BFH/os

National League of Cities

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Immediate Past President
Jessie M. Rattley
Councilwoman Newport News Virginia

Executive Director
Alan Beals

July 6, 1981

The Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
3306 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Roth:

The National League of Cities urges the Committee on Governmental Affairs to include provisions in the Regulatory Reform Act (S. 1080) to insure greater participation for States and local governments in developing federal regulations that directly affect them. In particular, we believe that the Federal Advisory Committee Act (FACA) should be amended to permit greater consultation with elected officials from general purpose State and local governments.

FACA has effectively reduced the opportunity for representatives of States and local governments to participate early in the process of developing federal regulations. Enacted in 1972 to insure open government, it requires federal agencies to follow strict procedures whenever meetings are convened to provide federal agencies with advice. Required under these procedures are the holding of public meetings, keeping detailed minutes, establishing carefully balanced advisory committees, and making reports available to the public. In order to avoid complying with these strict requirements, many federal agencies have followed a practice of not consulting with States and local governments as they develop regulatory policies. The Act has not served to open up the governmental process as originally intended and should be amended to recognize its shortcomings.

We recommend that FACA be amended to exempt elected officials of general purpose State and local governments, their organizations, and their representatives from coverage. Such a change would recognize the unique role of States and local governments in the federal system. Under the federal system, States and local governments should receive the rights and privileges of partners in that system. Permitting early consultation would go a long way towards restoring balance to the system.

Past Presidents: **Tom Bradley** Mayor Los Angeles California · **Henry W. Maier** Mayor Milwaukee Wisconsin · **Tom Moody** Mayor Columbus Ohio · **John P. Rousakis** Mayor Savannah Georgia · **Directors:** **Stephen C. Bauer** Executive Director League of Oregon Cities · **Arne Boyum** Executive Director North Dakota League of Cities · **Charles G. Clack** Mayor Garland Texas · **Malcolm Clark** Council Member Port Arthur Texas · **Thomas J. Clark** Council Member Long Beach California · **Joanne Collins** Council Member Kansas City Missouri · **Thomas H. Cooke Jr.** Mayor East Orange New Jersey · **Willie Dell** Councilwoman Richmond Virginia · **Woody Etherly Jr.** Council Member Flint Michigan · **W. Elmer George** Executive Director Georgia Municipal Association · **Anne Gresham** Council Member Grand Prairie Texas · **Paul E. Haney** Council Member Rochester New York · **George Latimer** Mayor St. Paul Minnesota · **Ronald P. Lurie** Commissioner Las Vegas Nevada · **Ruth W. Messinger** Council Member New York New York · **Robert H. Miller** Executive Director South Dakota Municipal League · **Ernest N. Morial** Mayor New Orleans Louisiana · **Mary Neuhauser** Council Member Iowa City Iowa · **Hernan Padilla** Mayor San Juan Puerto Rico · **Kenneth Payne** Executive Director Rhode Island League of Cities and Towns · **Donald R. Peoples** Chief Executive Butte Montana · **Jayne H. Plank** Mayor Kensington Maryland · **Patricia Roach** Commissioner Dayton Ohio · **Charles Royer** Mayor Seattle Washington · **James T. Ryan** Mayor Arlington Heights Illinois · **Arthur E. Trujillo** Mayor Santa Fe New Mexico · **Fred Turnage** Mayor Rocky Mount North Carolina · **John F. Watkins** Executive Director Alabama League of Municipalities · **Daniel K. Whitehurst** Mayor Fresno California · **Don A. Zimmerman** Executive Director Arkansas Municipal League

S. 1080 sets certain procedures for agency rulemaking. These procedures will also be extended to the making of rules and regulations which apply to recipients of federal assistance as grant conditions. Under S. 1080, all proposed rules and regulations must be published in the Federal Register with a notice including a statement of the need for the specific statutory authority for the rule or regulation and at least 60 days must be provided for written comment by interested persons. After the agency determines the final version of the rule or regulation, it must be published in the Federal Register for 30 days and must be accompanied by a statement of basis and purpose, including a memorandum of law showing that the rule or regulation is consistent with statutory authority. We believe this new requirement is very important, as it establishes a publicly reviewable record, providing points of law for subsequent challenge by States and local governments to excessive regulations.

S. 1080 also establishes special procedures for "major rules", defined to include regulations having an annual effect on the economy of $100 million and regulations substantially increasing costs to States and local government agencies. These major rules must then pass a stringent cost-benefit test. We believe that Section 2(c) of S. 1080, covering the notice of proposed rulemaking requirements, should be amended to include a procedure permitting State and local governments to challenge agency determinations that rules are not major.

First, the definitions of major rules as those substantially increasing costs to States and local government agencies should be further defined as including regulations which require States and local governments to make significant changes in their laws, regulations, ordinances, organizations, and fiscal affairs. Second, when States and local governments establish in the 60 day comment period that a proposed rule or regulation requires such changes, the federal agency should be required to designate the rule as major, or issue a statement indicating that no such changes are required, thereby establishing a judicially reviewable basis for its finding and enabling State and local governments to bring a court challenge to the agencies refusal to designate the rule as major.

In order to restore balance to the federal system, federal regulations requiring significant changes in how States and local governments operate must be categorized as major and submit to cost-benefit analyses. Without this change, the federal government will continue to play a dominant role in the federal system.

Thank you for your considering our suggestions. Our staff is available to provide any further assistance you may need.

Sincerely,

Alan Beals

Alan Beals
Executive Director

cc: Committee on Governmental Affairs

STATEMENT OF THE NATIONAL RETAIL MERCHANTS ASSOCIATION ON REGULATORY REFORM

The National Retail Merchants Association (NRMA) is a voluntary, non-profit trade association which represents 3,500 members who operate a total of 35,000 general merchandise and specialty stores throughout the United States that sell an infinite variety of products, from clothing, jewelry, cosmetics, sporting goods, and housewares to food, drugs, furniture, household appliances and automotive supplies. A majority of NRMA's members are small independent retailers with annual sales of $1 million or less.

In contrast to huge manufacturing entities, which may be compelled to spend hundreds of millions of dollars as a result of the adoption of a single environmental standard, no single agency, statute or regulation constitutes the primary control over retail activity. Instead, retailing is governed by perhaps the greatest range of regulators and regulations of any industry. Thus, retailers are subject to and are affected by regulations of the Federal Trade Commission (e.g., labeling, packaging, pricing, advertising, warranties); Consumer Product Safety Commission (consumer product safety, e.g., flammable fabrics, recalls of defective products, special packaging for hazardous substances); Federal Reserve Board (e.g., credit practices); Food and Drug Administration (e.g., food, OTC drugs, cosmetics, microwave ovens); Department of Labor (e.g., minimum wage and overtime requirements, employment discrimination, occupational safety); National Labor Relations Board (employee-management relations); Environmental Protection Agency (e.g., hazardous wastes, land use, parking); Department of Energy (e.g., building temperatures and energy consumption, utility rate reforms); Internal Revenue Service (taxes); Interstate Commerce Commission (e.g. transportation services); and others.

For this reason, the businesses that NRMA represents, and particularly the small businesses, though they need regulatory relief, by and large will not be significantly aided by regulatory reform proposals dealing with "major" rules (i.e., rules that will impose annual costs of $100,000,000 or more or that will otherwise cause significant adverse effects on productivity, competition, prices, innovation, etc.). For example, the regulatory impact analysis requirement of President Reagan's Executive Order No. 12291 and of several bills now pending in Congress would not apply to many of the rules to which NRMA members are subject. Thus, for retailers, who are being nibbled to death rather than swallowed in one big gulp, a different approach to regulatory reform is needed.

What kinds of regulatory reform will truly help retailers, especially the majority, which are small businesses?

-- Focus on the quality of regulators.

Individual administrators can and should play a significant role in determining how the laws entrusted to them will be implemented. Therefore, it is necessary to identify the characteristics that are required for particular positions and to establish personnel policies and appointment procedures that will facilitate the selection and appointment of highly qualified individuals.

-- Improve management and decision-making procedures.

A number of procedural reforms, particularly use of tools such as regulatory impact analyses, hold some promise for generally improving the quality of regulatory action. Care must be taken, however, to evaluate the cumulative effect of imposing many new procedural requirements simultaneously.

-- Most important, the organic statutes under which administrative agencies operate should be reformed.

Many of the agency actions that have prompted calls for regulatory reform are attributable not so much - or at least not only - to arbitrary thinking or inadequate procedures as to the existence of statutes that either specifically call for a certain rule that no longer is considered desirable or that contain so broad a mandate as to give an agency virtually unfettered discretion. Only Congress can address these problems, and Congress should, -- in a systematic and comprehensive review of federal regulatory statutes and how they are being implemented.

The Need For High Quality Regulators.

The quality of federal regulation is significantly influenced by the people who run the federal agencies. Thus, it is essential to select for policy making positions people who possess the requisite background and skills. These include not only the requisite technical competence (such as chemistry, toxicology, economics, law, or nuclear engineering), but also the character traits that will make them able and wise administrators (e.g., intelligence, diligence, integrity, creativity, flexibility, vision, leadership, and, perhaps most important, common sense). In addition, it is necessary to enlist the services of individuals who have appropriate personal experience, and hence, a sensitivity to the issues and an appreciation of the practical consequences of proposed regulatory actions that often is sorely lacking. Too little attention has been paid to the question of whether and to what extent government personnel policies and selection procedures are effective in making sure that the government can attract and retain people with the kinds of experience and skills that are needed, and some serious inquiry in this area would be beneficial.

New Agency Management And Analytical Systems Are Necessary -- But Not Sufficient.

Most of the regulatory reform proposals currently under discussion are designed to rationalize agency rule-making and decision-making processes through procedural, rather than substantive, modifications. This is true of President Reagan's Executive Order No. 12291, which requires executive agencies to prepare regulatory impact analyses for major rules and requires agencies to submit proposed and final rules to OMB for review before their publication in the Federal Register. It is also true of most of the regulatory reform bills now pending in both houses of Congress which would require, inter alia cost-benefit and cost-effectiveness analyses, paperwork budgets, regulatory budgets, regulatory agendas, periodic agency review of rules, Congressional veto, more stringent judicial review, and executive oversight.

We commend such measures insofar as they serve to instill regularity and discipline into the rule-making process. These have too often been missing in the past. We particularly endorse the use of regulatory impact or similar analyses to ensure, so far as possible, that agencies engage in a rigorous analysis of the consequences of and alternatives to specific regulatory proposals, that agencies consider the costs and benefits of proposed rules, and that agencies clearly articulate the factual and legal basis for regulatory actions. Further, insofar as these principles generally represent good management and decision-making practices, they should not be limited to use in conjunction only with major rule proceedings; rather, they should become standard operating procedure for all substantive agency actions.

At the same time, we recognize that to a certain extent, added steps (e.g., analyses, calendars, agendas, paperwork budgets, regulatory budgets, legislative veto, etc.) particularly when considered as a group, may add costs, in terms of increased delay of agency action or increased participation costs for regulated industry and other interested parties. Clearly it is necessary to consider not only the merits of individual reform proposals, but also the cumulative impact on agencies and the public of imposing a wide variety of additional budgetary, analytical and reporting requirements. Finally, despite their value as management and decision-making tools, regulatory analyses, budgets, agendas, and the like address only part of the regulatory overload problem, and thus, by themselves, comprise only part of the solution.

The Ultimate Regulatory Reform Consists Of Congressional Action To Clarify Vague Statutes, Update Old Statutes, And Coordinate Statutes Which Reflect Conflicting Policy Goals.

Many of the "regulatory excesses" that have fueled the debate over regulatory reform are attributable not only to arbitrary or sloppy administration, but also to the nature of the statutes being implemented. In some cases, agencies are operating under mandates that are so broad and vaguely defined, there is little basis for constraining their actions. In other cases, agencies are operating under mandates that clearly express a specific policy choice by Congress, but the choice is no longer considered wise. Finally, in other cases, agencies are operating under mandates that clearly express a desired policy choice, but the choice conflicts with other current policy goals.

In all three cases only Congressional scrutiny and revision of the agencies' authorizing legislation will afford any significant regulatory relief. Provisions for agency economic analysis, executive oversight, legislative veto, or heightened judicial review, for example, while perhaps useful for certain purposes, do not effectively address these types of problems, and thus can not substitute for a comprehensive and systematic review by Congress of the administrative schemes that have been established during the last century.

The problem of overly broad and vague statutory authorization is illustrated by the recent controversy over FTC actions to prevent "unfair or deceptive acts or practices" in commerce. Neither the FTC Act nor its legislative history provide meaningful guidance for applying the term "unfair." Rather, by authorizing the FTC "to prescribe rules which define with specificity acts or practices which are unfair or deceptive," the statute arguably creates the potential for the FTC to make value judgments and policy determinations that are vested by the Constitution exclusively in Congress. For example, FTC's now abandoned "kid-vid" rulemaking proceeding, in which the FTC considered, inter alia, banning the advertising of sugared cereals on children's television as inherently unfair because of the susceptibility of the audience, clearly presents the question of whether such a determination represents an appropriate exercise of administrative expertise or whether it constitutes a political, economic or philosophical determination that properly should be made by Congress.

It has been suggested by a number of scholars and other observers of the Washington scene that such expansive grants of authority from Congress to administrative agencies are a primary cause of the regulatory bog from which we are trying to extricate ourselves. An excellent description of the problem is found in the concurring opinion of Justice Rehnquist in Industrial Union Department, AFL-CIO v. American Petroleum Institute, 48 U.S.L.W. 5022 (July 2, 1980), in which the Supreme Court invalidated an OSHA regulation reducing the employee exposure standard for airborne concentrations of benzene from 10 ppm to 1 ppm, because of OSHA's failure to make a threshold determination that workplace exposure to benzene concentrations of 10 ppm presented a significant health risk. The court considered such a determination a prerequisite to concluding that the 1 ppm standard was "reasonably necessary or appropriate," in the words of the statute. Justice Rehnquist went further, however, in noting that, Congress, rather than OSHA, was responsible for the decisive material omission in the case. According to him, the case presented the question of how OSHA was supposed to know what to do when Congress did not tell it. In Justice Rehnquist's view, Congress used language that "read literally, . . . is completely precatory, admonishing the Secretary to adopt the most protective standard if he can, but excusing him from that duty if he can't. [It] . . . gives the Secretary absolutely no indication where on the continuum of relative safety he should draw his line." 48 U.S.L.W. 5040. According to Justice Rehnquist, by failing to resolve the issue for itself, Congress improperly delegated its policy-making function to OSHA, and derivatively, to the Supreme Court.

This is not the only case in which the language and legislative history of a statute has given the agency charged with its administration insufficient guidance about the considerations that were intended to govern its implementation. This deficiency is attributable sometimes to oversight, sometimes to inartful drafting, and sometimes to the inability of Congress to achieve a consensus on the issues. The result in all cases is the same, however -- the agency is obliged to go beyond merely filling in the blanks of a clearly drawn Congressional charter to legislating on its own under some vaguely defined notion of, e.g., fairness, feasibility, or the public interest. This process undercuts the separation of powers which is the cornerstone of our government under the Constitution. As Justice Rehnquist describes it,

> "If Congress wishes to legislate in an area which it has not previously sought to enter, it will in today's political world undoubtedly run into opposition no matter how the legislation is formulated. But that is the very essense of legislative authority under our system. It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people. When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process." 48 U.S.L.W. 5043.

The injury is compounded when, as is often the case, the courts are called upon to validate an agency's action or otherwise to enunciate the principles that should guide the agency in its implementation of a statute. As pointed out by Antonin Scalia, "[N]ow that judicial review of agency action is virtually routine, it is the courts, rather than the agencies, that can ultimately determine the content of standardless legislation."*/ Thus, rather than finding an unconstitutional delegation of power in vague and precatory language, the courts have struggled to give these statutes meaning. In breathing life into them, the courts are forced to articulate the policies and priorities that the Congress failed clearly to establish.

An obverse of the vague statute problem is the case of a statute that provides clear and explicit direction, but experience under the statute suggests that its stated policy may no longer be desirable, or it simply needs reexamination. This too presents a regulatory problem that only Congress properly can resolve. A good example of this is the FTC's rule on the pre-sale availability of written warranties.

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*/ Scalia, "A Note on the Benzene Case", Regulation (July/August 1980).

The FTC Act was amended in 1975 by the Magnuson-Moss Warranty -- Federal Trade Commission Improvement Act, which, inter alia, specifically directs the FTC to "prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him" [15 U.S.C. 2302(b)(1)(A)]. Accordingly, the FTC issued a rule (16 C.F.R. Part 702) requiring store owners to make written warranties on consumer products costing over $15 available for inspection by consumers before purchase by displaying the warranty in any one of four ways. As a matter of convenience, most retailers have chosen to comply with the rule by maintaining warranty binders. The cost to retailers of updating these binders to follow changes in inventory, product design and warranty terms is considerable. Yet, experience with the rule over the last 4 years shows that consumers almost never ask to see the binders. A petition to modify the rule has been filed with, and is now being considered by, the FTC. But, even if the evidence were to prove that the rule serves no purpose, the FTC cannot do away with it entirely because Congress has directed it to have some sort of rule. Thus, significant relief in this instance would require a statutory amendment from Congress.

Finally, many of the classic examples of regulatory "terribles" stem from Congressional enactment of individual particular problems without provision for dealing with conflicts and duplication. Thus, there are the EPA and Department of Interior rules that restrict the mining and burning of coal based on environmental considerations and the DOE rules that encourage the use of coal in an effort to achieve energy independence. Similarly, the Department of Health and Human Services requires the use of plastic waste basket liners in hospitals for health reasons while OSHA prohibits them as a fire hazard. There are countless other examples.

In short, too many agencies are left free to wander under vague and far-reaching mandates. Too many agencies must continue to execute specific directives that no longer represent the desired course. And too many agencies have conflicting missions.

These phenomena have prompted the now familiar complaints about "activist" agencies and courts that have engaged inappropriately in legislating. And it is these phenomena that are, in large measure, responsible for such proposals as legislative veto and proposals to alter the current standards of and venue for judicial review. In our view, both legislative veto and heightened judicial review come too late in time to have the desired effect.

We prefer that Congress give clear directions to the executive branch in advance. Simply as a matter of good management, it makes more sense for Congress to work out a set of clear instructions initially than to attempt to control agency discretion by reviewing regulations after the expenditure of much time, energy, and money in developing them.

There are tough choices to be made, which should be made by Congress. There is guidance to be given, which should come from Congress -- not from OMB, and not from a single Congressional committee. In particular, it is essential to establish a procedure or mechanism for the systematic review by Congress of the organic statutes under which individual agencies operate with a view toward specifying and clarifying their authority, establishing priorities, and resolving conflicts.

As stated by Congressman Moakley (D. Mass.) at hearings in the House of Representatives on H.R. 746,

> Effective coordination involves reassessing legislative priorities, particularly where conflict and overlap are found to exist. This is and should be a legislative function. . . .
>
> While providing the Executive with better tools to manage the regulatory process may improve the situation, Congress should not shift the focus or the blame beyond itself. The roots of the regulatory problems are nurtured in the legislative turf. Insofar as regulatory reform means redefining legislative priorities, providing consistency in the regulatory scheme, shaping national policy and monitoring the execution of legislative mandates, the prime move of that reform should be Congress. The first step in the process should be for Congress to recognize its own deficiencies and to provide itself with the institutional mechanism for defining national goals and for identifying and balancing conflicts and duplications among regulatory policies, programs and rules.

STATEMENT OF EDWARD C. SCHMULTS, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee:

It is a pleasure to appear before you today to present the views of the Department of Justice regarding H.R. 746, the proposed Regulatory Procedure Act of 1981.

This Administration shares with you the goals underlying H.R. 746, as should be evident from the similarity of many of the bill's provisions to those of Executive Order 12291. The Executive Order currently requires Executive agencies to perform a number of important procedural steps that the bill would enact into law. These include requirements for analyses of the costs and benefits of proposed major rules, for periodic review of existing rules, and for publication of agendas of planned rulemaking.

Also by reason of that similarity, however, we are concerned that legislation establishing inflexible rules may be premature at a time when important experience is still being developed under the Executive Order's new procedures. The Administration is finding, for example, that certain elements of the preliminary and final regulatory analyses can be merged, and that certain classes of rules can be exempted while certain other elements are so useful as to require even more expansive application. We suggest that the bill give more flexible oversight to the Administration and provide for a delayed effective date that would allow the Administration the opportunity to accumulate experience on these matters, under the Executive Order.

There are two major issues of constitutional and administrative law which must be addressed. Of course I will be happy to respond to all of your questions concerning H.R. 746, either during this testimony or in writing afterward.

I.

Section 201 of H.R. 746 presents the issue of the so-called "Congressional veto" of agency regulations. This Section requires passage of a joint resolution by Congress to disapprove agency rules, during a holding period pending final announcement of a rule. A joint resolution must be signed by the President or passed by two-thirds majorities over his veto. The disapproval of a regulation would have the force of law, but the means proposed for expressing this disapproval include all the steps necessary for law-making: the concurrence of two houses of Congress and presentation to the President. Hence, we see no constitutional impediment to this aspect of Section 201.

Section 201 would, however, also authorize a committee of Congress, acting alone, to delay the legal effectiveness of an agency regulation that is authorized by statute. Since authorized agency regulations have the effect of law, deferral of a regulation accomplishes a legislative result and, therefore, must follow the procedures of Article I, § 7, requiring the agreement of both Houses and presentation to the President.

The present infirmity in Section 201 can easily be cured. One suggestion would be to provide that, once a committee reports a joint resolution disapproving a rule, the agency shall either defer the rule's effective date on its own accord for a stated period or furnish an explanation why it will not do so. The committee's action would thus lack the mandatory force of legislation, and would therefore be constitutional. At the same time, as a practical matter, this approach would substantially achieve the goal of the provision as presently drafted. Agencies would be most unlikely to decline to defer the effectiveness of a rule regarding which a resolution of disapproval has been reported out of the agency's own committee, unless in the case of emergency, which is an exception to the veto-provision even as presently drafted.

With regard to the legislative veto, all we can do at the Department of Justice is to render our very best advice on what the law is. We are cognizant of the fact that, although all Presidents from Hoover to Carter have opposed Congressional vetoes, they have nonetheless signed legislation containing such provisions for a number of different policy reasons. Strictly from the policy point of view, without retreating from its obligation to question the constitutionality of the matter in court, the Administration is not opposed to all Congressional oversight devices and could, in the legislative process, accept certain versions applying to selected "independent" agencies.

II.

My second area of deepest focus is on Section 207 of H.R. 746. Two important changes in the judicial review provision of the Administrative Procedure Act are accomplished by Section 207 of the bill.

Bumpers Amendment

First, in informal rulemaking, a reviewing court is required to set aside rules whose necessary facts lack substantial support in the rule-making file. Presently, review of such matters is under the "arbitrary and capricious" standard, according to which courts engage in a "substantial inquiry, searching and careful," into factual premises of rules. While the reviewing court may not substitute its judgment for that of the agency, it must take a "hard look" at the facts relied on by the agency for its conclusion. If the necessary facts that support the agency's action are found to be defensible, then the reviewing court's function is at an end.

The present state of administrative law was worked out over thirty-five years, and its meaning is fairly well understood. Additionally, the provisions of Executive Order 12291 now impose the administrative control requiring an agency to ascertain before approving any final major rule, that

> the factual conclusions upon which the rule is based have substantial support in the agency record, viewed as a whole, with full attention to public comments in general and the comments of persons directly affected by the rule in particular.

With this status of current law, I fail to see what purpose the bill's proposed language is to serve. I do see potential for harm, however. The Executive Order uses the term "substantial support," but explicity prevents any reliance on that, or other phrases of the Order, in judicial review. The proposed statute, on the other hand, would invite judicial construction at once. It challenges the imagination to ponder how twelve federal circuits, and multiple panels within each one of them, would interpret the phrase "substantial support" for informal rulemaking.

"Substantial evidence" is presently required for formal rulemaking and adjudication. Is this standard what is meant to apply to informal rulemaking? There are many good reasons for keeping the standards of review different, for the formulation of informal rules is quite different from adjudication or formal rule-making. But I am not sure that "substantial support" means "substantial evidence."

Unless the Committee can agree on a single, instantaneously and unambiguously understood definition for that term, the Department of Justice would advise that the gain over the status of present law is not worth the cost of uncertainty that introducing this requirement would engender. Under the Executive Order, the meaning of this phrase will be worked out, with OMB and the Presidential Task Force on Regulatory Relief providing single direction, as an internal administrative safeguard. For the present, that is where the matter is most advantageously left.

The second proposed amendment to the judicial review section of the Administrative Procedures Act accomplished by Section 207 of H.R. 746 is even more troubling. The first sentence of proposed section 706(c) would remove existing presumptions favoring the validity of agency actions with regard to "questions of law." This is a very broad category. "Questions of law" would include questions of constitutionality, procedural interpretation, and procedural regularity, as well as statutory law. Courts have long presumed the constitutionality of agency action for the same reason that they presume the constitutionality of legislation -- to avoid unnecessary intrusions into the decisions of a coordinate branch of government. With regard to procedures, the Supreme Court has recently emphasized the need for courts to recognize the agencies' discretion to choose the procedures best suited to performing their assigned tasks, consistent, of course, with procedures prescribed by statute. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). And an agency, as draftsman, surely should be accorded some deference as to the meaning of its own regulations.

Turning to statutory authority and statutory interpretation, the agency that works with a statute undoubtedly has valuable insight into how that statute's terms are most sensibly and efficiently to be interpreted. The deference that properly flows from that circumstance, however, is not allowed to overcome the plain wording of a statute, or the result pointed to by legislative history. The proposed amendment would require that decisions on statutory authority be based entirely on the language of the statute or other ascertainable legislative intent. All we would urge is that the Congress intends that its laws be efficiently carried out; and that, where an agency interprets its organic statute in a way it believes most faithful to Congressional intent, that judgment is valuable for a court to consider. Such an agency ruling is entitled to deference for the reasons the late Judge Leventhal set forth in his testimony before the Senate Judiciary Committee in 1979:

> The court does give some deference to, though it is not concluded by, an agency's interpretations of its actions and the pertinent statutes, provided they are reasonable, and not divergent from an ascertainable legislative intent. That is the teaching of the Supreme Court . . . . This strikes an appropriate balance. When the legislative history is not illuminating on an issue, and when the agency had made a determination that the court finds reasonable, it is productive of orderly government for the court to accept the agency's view. It enables all interests involved -- industrial, commercial, environmental, and all other elements of the public interest -- to plan their activities at an early date with reasonable confidence that their investments of time and resources will not be wasted. And since a court is always there to review the reasonableness of the interpretation, the agency is not set free to act arbitrarily, or out of whim or misplaced and excessive zeal.

Regulatory Reform, Hearings Before the Senate Committee on the Judiciary, 96th Cong., 1st Session 22 (1979).

This current formulation recognizes that judicial deference to Executive interpretations, within reason and ascertainable legislative intent, is a critical part of the Executive's practical discretion on a day-to-day level. Since statutes do not generally resolve all the myriad problems of administrative interpretation, the Executive must have some power to act interstitially.

In conclusion, I would like to sound a general warning note about efforts to cure administrative deficiencies: it will be a rare case where such remedy is found in increasing the role of the reviewing courts. With the abandonment of deference to the administrative agency, the opportunity for creative interpretation of laws and regulations, and independent weighing of facts, looms great for the judiciary. It is almost a truism that what your bill takes from administrative agencies, it gives to courts.

The power to administer must remain with the agencies, and more broadly, the Executive Branch. The Administration, through the Executive Order and other means, is devoting much attention to make sure those agencies are doing their job efficiently. Where they have failed, the solution requires Congressional involvement, through more carefully crafted laws and greater oversight. The role of the courts in this process is very small and narrowly delineated. The courts sit to review challenged agency actions for compliance with law, not to substitute their own judgments for these of the administrators. Any well intentioned reform of administrative law must be wary of the unintended potential side effect of expanding the role of the courts.

Again, let me repeat that I applaud the efforts of your committee to join in our common enterprise to seek improvements in the administrative process. I would be happy now to answer any questions you may have.

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